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(Appears at the end)

RELEVANT DOCKET ENTRIES

Date

1968

May 27—1. File Complaint.

May 27—Issue Summons.

May 27—2. Enter and File Temporary Restraining Order returnable on June 7, 1968 at 9 a.m. in Courtroom No. 1; WEC.

May 27—3. File Pltf's. memorandum of points and authorities.

May 27—cc of Temporary Restraining order issued for service.

May 28—Original of Judge Craig's Notification and Certificate mailed to Judge Chambers; copies thereof mailed to James M. Bush, Jacob Abramson and the Atty. General.

May 29—4. File Summons with Marshal's return show service with temporary restraining order made upon L. J. Pike.

June 3—5. File Pltf's. application for leave to take deposition of deft L. J. Pike; and Enter and File Order that pltf. is granted leave of court to take said deposition within the period of 20 days.

June 3—6. File original Notification of Hearing to the Governor of the State of Ariz. and the Attorney General, and mail copies thereof to each of said officials by certified mail.

June 3—7. File Pltf's. Notice of taking the deposition of deft. L. J. Pike.

June 3—8. Enter and File Order by Judge Richard H. Chambers designating the following to preside in this action: Hon. Charles M. Merrill, U. S. Circuit Judge for the Ninth Circuit; Hon. Walter E. Craig; and Hon. C. A. Muecke.

June 4.—9. File Affidavit of James M. Bush of service of notice of taking deposition of L. J. Pike upon the Attorney General.

June 6—10. File Application of Jacob Abramson for limited admission, with consent by James M. Bush; and Enter and File

Order that Jacob Abramson is hereby permitted to appear and participate in this action.

June 7—11. File Deposition of L. J. Pike, in 2 volumes.

June 7—12. File Deposition of David Gipe.

June 7—Minute Entry: This case called for hearing on application for preliminary injunction pursuant to Temporary Restraining Order. Jacob Abramson, James Bush, Rex E. Lee and Tom Miller present. Enter proceedings of hearing. It is ordered that a preliminary injunction issue, Jacob Abramson to prepare formal order within 10 days and if counsel for deft. has any objections, the same to be filed within 5 days thereafter. In the event counsel are able to arrive at an agreed statement of facts, it is ordered that pltf. file opening trial brief on law by August 1, 1968, that the response be filed by September 1, 1968 and that the reply be filed by September 23, 1968. It is further ordered that this case is set for trial in Courtroom No. 1, on October 7, 1968 at 9:30 a.m.; 3 judges.

June 18—13. Enter and File Order that plaintiff's application for preliminary injunction is granted pending trial of this matter, and further ordered that said preliminary injunction shall remain in full force and effect until final hearing in this case and further order of this Court, signed by three Judges on June 7, 1968.

June 18—Form AO 145 (notice to counsel) mailed to Evans et al and the Atty. General.

June 24—14. File ANSWER of the defendant.

July 26—15. Enter and File Order that the time within which plaintiff shall file its opening brief is continued to Sept. 1, 1968. The date to respond thereto is continued to Oct. 23, 1968. Trial date is continued to Nov. 15, 1968 at 9:30 a.m.; 3 judges.

Sept. 23—16. File Reporter's Transcript of Proceedings dated June 7, 1968.

Oct. 30—17. File Defendants' Motion for leave to file typewritten briefs; and Enter and File Order that the parties may file typewritten briefs, reproduced by xeroxing or other reproducing processing in the instant case. WEC

Nov. 5—18. File Defendants' Opening Brief.

Nov. 5—19. File Parties' Stipulation of Facts.

Nov. 5—20. File Plaintiff's Opening Brief.

Nov. 14—21. File Plaintiff's Reply Brief.

Nov. 14—22. File Defendants' Reply Brief.

Nov. 15—Minute entry: On for trial. James Bush and Jacob Abramson pres. for Plaintiff. Hamilton McRae, Rex Lee, and Thomas Miller pres. for Defendants. Case argued to court by respective counsel. It is ordered that said matter is submitted and taken under advisement.

1969

Jan. 29—23. File OPINION; and Enter and File Order that the injunction heretofore issued restraining the defendant L. J. Pike, his deputies etc. from threatening, ordering or attempting or acting (a) to hinder, interfere with, impede, restrain or prevent plaintiff from harvesting its crops of cantaloupe and transporting said cantaloupe in bulk into the State of California; (b) to seize and take possession of any crops harvested, loaded or transported; (c) to take any action to forfeit bonds, or to deny or revoke licenses of the plaintiff, or (d) to take any other action penalizing, injuring or damaging plaintiff on account of or because of such harvesting etc. in interstate commerce shall be permanent; 3 judges.

Jan. 29—Copies of opinion and order given to 3 judges and mailed to Evans et al, Jacob Abramson, Attorney General and Jennings et al.

Feb. 4—24. File Defendants' Motion for Rehearing and/or Clarification. (Copies for 3 Judges).

Feb. 10—25. File Plaintiff's objection and Response to De-

fendants' Motion for rehearing etc. (copies for 3 Judges)

Mar. 10—26. File OPINION and Enter and File Order that the injunction heretofore issued restraining the defendant L. J. Pike, his deputies etc. from in any manner attempting or acting (a) to hinder, interfere with etc. or prevent plaintiff from harvesting its crops of cantaloupe grown by plaintiff in the State of Arizona, in the vicinity of Parker, Arizona, and from transporting said cantaloupe in bulk into the State of California; (b) to seize and take possession of any crops harvested, loaded or transported; (c) to take any action to forfeit bonds, or to deny or revoke licenses of the plaintiff because of harvesting, loading or transporting such crops; or (d) to take any other action penalizing, injuring or damaging plaintiff on account of or because of such harvesting, loading or transporting in intrestate commerce shall be permanent; 3 judges.

Mar. 10—Copies of opinion and order mailed to Evans et al, Jacob Abramson, Attorney General, Jennings et al and to Judge Merrill, Judge Craig and Judge Muecke.

Apr. 1—27. File Defendants' Motion for Rehearing.

Apr. 1—Copies of Motion for Judge Merrill, Judge Craig and Judge Muecke.

Apr. 7—28. File Plaintiff's Objections to Motion for Rehearing.

May 1—29. Enter and File Order that defendants, having filed a Motion for Rehearing, and plaintiffs having filed its objections thereto, and the Court being fully advised in the premises, it is ordered that the Motion for Rehearing is denied; 3 judges.

May 1—Copies of order mailed to Abramson and Church; Evans et al, the Attorney General and Jennings et al.

May 2—30. File Defendants' Notice of Appeal to Supreme Court of U.S., showing service on plaintiff's counsel.

May 12—31. File Defendants' Resignation Re Contents of Record on Appeal (letter to clerk).

May 16—32. File Plaintiff's Designation Re Contents of Record on Appeal, with copy of the two letters designated attached.

June 18—33. File Reporter's Transcript of Proceedings — Hearing held at Phoenix on November 15, 1968 (original and free copy).

June 25—Record on appeal consisting of all original documents including deposition exhibits and certified copy of docket entries, certified and transmitted to Supreme Court of the United States, Washington, D.C., with request that original documents be returned upon disposition of the appeal.

Aug. 28—34. File Stipulation Between Appellant and Appellee Regarding Errors in the Transcript of Proceedings.

Sept. 2—Supplemental record on appeal, consisting of Stipulation filed 8-28-69 and clerk's certificate, transmitted to Clerk Supreme Court of United States.

Oct. 20—35. File Notice from Supreme Court of the United States Re Jurisdiction.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, AS SUPERVISOR OF INSPECTION, ARIZONA FRUIT AND VEGETABLE STANDARDIZATION SERVICE,
Appellant,

versus

BRUCE CHURCH, INC., A CALIFORNIA CORPORATION,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

FILED JUNE 30, 1969

PROBABLE JURISDICTION NOTED OCTOBER 13, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRUCE CHURCH, INC. a California corporation, Plaintiff, vs. L. J. PIKE, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service; and DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE and DOE TEN, Defendants.	Civil Action No. 6702 COMPLAINT

Plaintiff complains of the Defendants and each of them, and for a cause of action alleges:

I.

This action arises under the Commerce Clause, Article I, Section 8, of the Constitution of the United States, and the Supremacy Clause, Article VI, of the Constitution of the United States, as hereinafter more fully appears. The value of the right of Plaintiff, derived from Federal law, to engage in interstate transportation of its own products, free from undue or unreasonable restraints by the Defendants, exceeds, exclusive of interest and costs, the sum of $10,000.00, and the amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs.

II.

Plaintiff is a corporation incorporated under the laws of the State of California and has its principal place of business in the State of California.

The Defendant, L. J. PIKE is a citizen of the State of Arizona and is the Supervisor of Inspection of the State of Arizona Fruit and Vegetable Standardization Service.

The Defendants, DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE and DOE TEN, and each of them, are citizens of the State of Arizona.

That the true names of Defendants, DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE and DOE TEN are unknown to Plaintiff, and the said Defendants are sued herein in their fictitious names. Plaintiff prays leave to substitute the true names of said Defendants together with appropriate allegations when their true names are ascertained.

III.

This suit is of a civil nature and is brought for the purpose of obtaining a declaratory judgment pursuant to 28 United States Code, Section 2201, that the State of Arizona Fruit and Vegetable Standardization laws, Arizona Revised Statutes, Title 3, Chapter 3, Article 4, and in particular, but without limitation, the following sections thereof:

Section 3-499, entitled "Labeling of containers; subcontainers; mislabeling; controlling laws";

Section 3-503, entitled "CANTALOUPES; definitions; serious damage; standard packs; crate markings; irregular sized container; exceptions";

Section 3-518, entitled "Exempt Transactions";

Section 3-522, entitled "Violations; penalty";

Section 3-482, entitled "Scope of article; containers";

Section 3-486, entitled "Supervisor; inspection powers";

Section 3-487, entitled "Supervisor; rule making";

Section 3-488, entitled "Supervisor; investigation of transactions and records";

Section 3-492, entitled "Annual licensing of dealers; application; fee; revocation for misrepresentations";

Section 3-493, entitled "Bond of applicant; action for damages";

Section 3-494, entitled "Denial or revocation of license";

are unreasonable, arbitrary, capricious, discriminatory, unlawful, unconstitutional, void and unenforceable if, to the extent that, and insofar as, said laws and any of the provisions thereof are interpreted, applied, enforced or given effect so as to hinder, interfere with, impede, prevent, restrain or prohibit Plaintiff from harvesting its crops of cantaloupes grown by Plaintiff in the State of Arizona in, around and about Parker, Arizona (where Plaintiff does not have processing or packing facilities for cantaloupe crops), placing the harvested cantaloupes loose in trailers and transporting said crops so loaded on trailers by truck across the state line of Arizona into the State of California to Blythe (where Plaintiff does have processing and packing facilities) for processing, packing and shipping in standard containers and under standards and requirements the same as or equivalent to those which would be applicable if these crops were processed, packed, and shipped in the State of Arizona; as well as for the purpose of obtaining an order restraining and enjoining the Defendants, and each of them, from threatening, attempting or acting to hinder, interfere with, impede, prevent, restrain or prohibit the Plaintiff from harvesting, loading, and transporting its cantaloupe crops in the manner and for the purpose aforesaid, across the state line of Arizona into the State of California.

IV.

Plaintiff is at the present time and has for many years past been engaged in the business of growing, harvesting, transporting, processing, packing, and shipping fruits and vegetables in the states of Arizona and California for sale in markets

throughout the Nation. In the State of Arizona, Plaintiff has carried on operations at various locations, including Parker, Yuma, Harquahala Valley, Aguila, and Horne. In the State of California, Plaintiff has carried on operations at various locations, including the Salinas Valley, Blythe, and the Imperial Valley. Plaintiff has maintained processing and packing sheds, equipment and facilities of various kinds required in connection with its operations at the above-mentioned locations, but Plaintiff does not have at the present time at Parker, Arizona, processing or packing facilities required for the handling of cantaloupe crops or preparing them for shipment in interstate commerce.

V.

On or about February 5, 1964, Plaintiff entered into a certain Agricultural Lease with the Secretary of Interior of the United States of America, as Lessor, the Commissioner of Indian Affairs, the Colorado River Indian Agency and the Colorado River Indian Tribes, pursuant to which Plaintiff undertook to develop approximately 6,400 acres of uncultivated, arid lands in the Colorado River Indian Reservation, located at Parker, Arizona. At the time the lease was signed, the land was arid wasteland covered with mesquite. Under the lease, which is for a term of 25 years, Plaintiff, in addition to being required to pay rent in excess of $1,500,000.00, undertook to improve and develop the land by extensive clearing operations, leveling the land, and constructing a complex, modern and efficient irrigation system so that crops could be grown on the land. Continuously since taking possession of the lands pursuant to the lease, Plaintiff has been engaged in the planning, improving, developing and operating of the lands. In the process of improving and developing the lands, Plaintiff has been required to carry on extensive and costly operations by chain dragging the land with tractors to clear off the mesquite, chiseling out the roots and burning the mountains of mesquite; moving approxi-

mately six million (6,000,000) cubic yards of dirt to create a uniform, level soil structure several feet thick in each of the 320 fields into which the farm was surveyed; constructing a five-foot deep, concrete-lined canal approximately three miles in length to carry Colorado River water to the fields; laying approximately 41 miles of poured-in-place concrete irrigation pipe throughout the farm; and finishing the land by grading it, an operation which involved the movement of approximately another one million (1,000,000) cubic yards of dirt. In addition, Plaintiff has constructed on the land implement sheds and other service buildings. Plaintiff has also built six two-bedroom houses and facilities for 22 house trailers for its employees. Plaintiff, in connection with the development and operation of the farm has furnished employment to members of the Colorado River Indian Tribes as well as others residing in the Parker area. Plaintiff's operations and activities in this connection have involved the expenditure of very considerable sums. Attached hereto and made a part hereof as Exhibit "A" is a folder prepared by Plaintiff as part of its recent dedication ceremonies, which contains a pictorial representation of the work accomplished at Parker.

VI.

As a result of its work and efforts as aforesaid, Plaintiff has succeeded in accomplishing a state of development originally projected for five years within a period of about four years. Approximately 6,300 acres of crops are now under cultivation, including 501 acres of cantaloupes which will mature and be ready for harvest on or about June 10, 1968. The period of harvest will last about three weeks. Cantaloupes are a highly perishable crop and must be harvested, processed and packed for shipment promptly on reaching maturity or the crop will spoil and become worthless.

VII.

Plaintiff has for many years been engaged in the business of selling and shipping cantaloupes to buyers and receivers in vari-

ous states of the United States, and the cantaloupe crops grown by the Plaintiff at Parker were grown for the purpose of supplying the requirements of its customers and the ultimate consumer, the general public, throughout the nation. Loss or curtailment of Plaintiff's cantaloupe crop at Parker will not only cause irreparable damage and injury to the Plaintiff in its relations with its customers, but will also cause serious injury and damage to the Plaintiff in its competitive position in the cantaloupe markets of the nation and will result in substantially diminished cantaloupe crops in interstate markets, with resultant higher consumer prices.

VIII.

Although Plaintiff does not have at the present time, at its farm at Parker, the processing and packing facilities needed for the handling of cantaloupe crops and preparing them for shipment to market in interstate commerce, Plaintiff does have such facilities under lease at Blythe, California, a distance of approximately 31 miles from the farm at Parker. These facilities were used by Plaintiff in the year 1967 for the processing and packing of its cantaloupe crops grown at Parker in 1967, that being the first year in which such crops had been grown by Plaintiff at the Parker farm. The crops were harvested, loaded loose in trailers and transported to Blythe for processing and packing. This was done with the full knowledge and aquiescence of the Defendants. The transportation of said cantaloupe crops, in the manner described, across the state line of Arizona into California was thus permitted, notwithstanding that the aforesaid Arizona Fruit and Vegetable Standardization laws were then also in effect. Plaintiff is informed and believes, and on such information and belief alleges, that for years past, various other growers and shippers have also been permitted, with the full knowledge and acquiescence of Defendants, to transport cantaloupe crops, as well as other agricultural crops, in

bulk across the state line of Arizona into the State of California for processing, packing and shipment in interstate commerce. In reliance on this long administrative practice, and in reliance on the application given by Defendants to the law during the year 1967 in respect of its cantaloupe crops grown at Parker, Plaintiff undertook to plant and grow another cantaloupe crop to mature in 1968, which it proposes to harvest, place in trailers and transport to Blythe for processing and packing, as aforesaid. However, Defendant, L. J. PIKE, Supervisor of Inspection of the State of Arizona Fruit and Vegetable Standardization Service and the other Defendants have, by notice to Plaintiff and other diverse acts, threatened to hinder, interfere with, impede, restrain, prevent and prohibit Plaintiff from loading and transporting its cantaloupe crops in the manner and for the purpose aforesaid, across the state line of Arizona into California; and if not restrained and enjoined by this Court, the Defendants, and each of them, will continue to threaten and will attempt and will act to hinder, interfere with, impede, restrain, prevent and prohibit the Plaintiff from loading and transporting its cantaloupe crops in the manner and for the purpose aforesaid, across the state line of Arizona into California.

IX.

Defendants, and each of them, seek to hinder, interfere with, impede, restrain, prevent and prohibit such loading and transportation by Plaintiff of its cantaloupe crops across the state line of Arizona into California in the manner and for the purpose aforesaid on the basis of the provisions of the Arizona Fruit and Vegetable Standardization laws hereinabove referred to in paragraph III. Such laws, among other provisions, state, in Section 3-503, that ". . . All Cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the supervisor. . . .", with certain stated exceptions

not applicable here; and such laws provide further certain penal provisions, as in Section 3-522, that:

"B. It is also unlawful:

1. To pack, cause to be packed, sell, offer for sale, deliver for shipment, load, ship or transport for shipment any fruits or vegetables which do not conform to the requirements of this article.

2. To prepare, deliver for shipment, load, ship, transport, offer for sale or sell for shipment, a deceptive pack, load, arrangement or display of fruits or vegetables, or to mislabel any container or display of the fruits or vegetables.

C. A person violating a provision of this section, or a provision of this article other than provided in this section, is guilty of a misdemeanor."

and such laws further permit the seizure by Defendant, L. J. PIKE, of fruits and vegetables packed, delivered for shipment, loaded, shipped or being transported in violation of the law; and provide further for the forfeiture of bonds and denial or revocation of licenses for violations of the provisions of the law.

X.

The State of California also has standardization laws which apply to cantaloupe crops grown in that state and processed and packed for shipment in that state. These are contained in the California Agricultural Code, Sections 3, 42941, 43251, 45633, 45663, 45664, and other sections. Among the provisions of such Code, are provisions (Sections 45633, 45663 and 45664) which provide for packing of cantaloupes in standard containers of the same sizes and descriptions as those prescribed in Arizona. These standard containers are of uniform dimensions and specifications adopted by the pertinent authorities as part of a plan to achieve uniformity among growers and shippers in the Western States generally. They are so used by growers, many of whom carry out the same growing, packing and shipping operations in the several states, such as Arizona and California, as does

Plaintiff. The conditions and standards provided in the Standardization laws of Arizona and California are likewise the same or very similar and are based on the same primary objectives namely to avoid deceptive packs.

XI.

Accordingly, a case of actual controversy has arisen and now exists between Plaintiff and the Defendants, and each of them, in the following respects:

(a) Defendants, and each of them, contend that the Arizona Fruit and Vegetable Standardization laws prohibit the transportation of cantaloupes loose in trailers across the state line; and that, accordingly, it would be unlawful and in violation of the laws of the State of Arizona for Plaintiff to harvest its cantaloupe crops at Parker, Arizona, place them loose in trailers, and so transport them across the state line to Blythe, California, for processing and packing at facilities of Plaintiff there, in standard containers the same as those approved in Arizona preparatory to shipment, and shipment, to markets in interstate commerce.

(b) Plaintiff contends that:

(1) It has the right under the Constitution and laws of the United States to harvest its crops of cantaloupes grown at Parker, Arizona, place them loose in trailers, and so transport them across the state line to its facilities at Blythe, California for processing and packing in the manner and under the conditions heretofore described.

(2) Any interpretation, application or enforcement of the Arizona Fruit and Vegetable Standardization laws in the manner proposed and threatened by Defendants would constitute an unreasonable and undue burden upon, and obstruction of, interstate commerce, in violation of the Commerce Clause, Article I, Section 8, of the Constitution of the United States and would be violative of Plaintiff's rights thereunder as aforesaid.

(3) The Congress of the United States by various enactments, including the Agricultural Adjustment Act, of May 12, 1933, Chapter 25, Title 1, 48 Stat. 31 et. seq., Title 7 U.S. Code, § 601, et. seq., and subsequent amendments thereof, the Act of March 4, 1915, Chapter 158, 38 Stat. 1186, 1187, 15 U.S. Code, § 234-236; the Act of August 31, 1916, Chapter 426, 39 Stat. 673-674, 15 U.S. Code, § 251-256; the Act of May 21, 1928, Chapter 664, 45 Stat. 685-687, 15 U.S. Code, § 257-257i; and other enactments, has entered and pre-empted the field in respect of regulating the containerization requirements in connection with packaging, transporting, shipping or handling of agricultural products and commodities in interstate commerce, and accordingly, the state laws and regulations sought to be enforced by the Defendants herein are in derogation of the rights of the Plaintiff and are violative of the Supremacy Clause, Article VI, of the Constitution of the United States.

. . .

XII.

Processing and packing facilities required for the handling of Plaintiff's cantaloupe crops at Parker, Arizona, cannot be constructed by June 10, when the cantaloupe crops will reach maturity, or in sufficient time before the cantaloupe crops must be harvested. If Plaintiff is prevented by Defendants from transporting its cantaloupe crops across the state line loose in trailers for the purposes aforesaid, it would result in the total loss of the crop, with resulting loss and damage to Plaintiff, in the amount of approximately $300,000.00. Any such conduct by Defendants would also cause injury and damage to Plaintiff in the respects heretofore alleged and would, further, constitute and cause serious interference by Defendant with Plaintiff's contractual relations with the Secretary of Interior of the United States of America, as Lessor, the Commissioner of Indian Affairs, the Colorado River Agency and the Colorado River Indian Tribe,

with the lessor of Plaintiff's processing and packing facilities at Blythe, and with the interstate customers of Plaintiff, to whom continuity of supply is of great importance. Plaintiff is informed and believes, and on such information and belief alleges, that if the Defendants succeed in carrying out their threats, this will seriously interfere with, and materially impair, the successful development of the Indian lands administered by the United States Department of the Interior in the Parker area, and tend to discourage and frustrate private investment in the development of these waste lands into productive farm lands.

XIII.

Further, in order to pack and ship its cantaloupe crops, it is necessary that Plaintiff have a large supply of packing crates and ice, which are inventoried at Blythe, California in advance, so as to be ready for immediate use when the crops mature and the harvest commences. Plaintiff has, of necessity, had to place orders for such supplies and must make further commitments as well as arranging for availability of the required railroad cars for interstate shipments if the crop is not to be lost for lack of these supplies and equipment. If Defendants are not restrained and enjoined from carrying out their orders and threats, Plaintiff will sustain heavy loss in respect of the supplies already committed for and will be placed in great jeopardy in respect of the supplies and equipment still to be obtained.

XIV.

The products here involved are not being brought *into* the State of Arizona from other states, but are to be taken *out* of the State of Arizona for processing and packing, in like standard containers and under like conditions. If and to the extent that the Arizona Fruit and Vegetable Standardization laws are interpreted applied, given effect or enforced to prevent this, such laws un-

reasonably discriminate against out-of-state processors and packers in favor of Arizona processors and packers and are unlawful and void.

XV.

If and to the extent that the action threatened by Defendants or the interpretation or effect being given by them to the Arizona laws is sought to be based upon the police power of the state, that is to say the protection of the public health, safety, or welfare of the citizens of the State of Arizona, this cannot serve as any legal or valid basis for the infringement upon interstate commerce which it would effect, since the crops so transported will not be returned for marketing or sale in the State of Arizona until they have been processed and packed in compliance with the Fruit and Vegetable Standardization laws of the State of California, which have standardization requirements like those of Arizona.

XVI.

If and to the extent that the action threatened by the Defendants or the interpretation or effect sought to be given by them to the Arizona laws has as their purpose and object to serve the economic interests of Arizona growers, packers and shippers to the detriment and disadvantage of those seeking to accomplish their processing, packing and shipping in the State of California under like standards and conditions, such action and such laws constitute an unreasonable discrimination against and burden upon those growers, processors and packers in interstate commerce and are unlawful and void.

XVII.

Plaintiff has exhausted its administrative remedies and has no adequate remedy at law, and will be irreparably injured by the wrongful and unlawful acts of the Defendants in threatening, ordering, attempting, or acting to enforce the provisions of the

Arizona Fruit and Vegetable Standardization laws against Plaintiff, so as to hinder, interfere with, impede, restrain, prohibit and prevent Plaintiff from transporting its cantaloupe crops loose in trailers across the state line of Arizona to Plaintiff's processing and packing facilities at Blythe, California, unless the Defendants, and each of them, are restrained and enjoined by this Court from so threatening, ordering, attempting to act, or acting.

WHEREFORE, Plaintiff demands:

(1) That a declaratory judgment issue declaring that the provisions of the Arizona Fruit and Vegetable Standardization laws are violative of Plaintiff's rights under the Constitution and superior laws of the United States and are void and unenforceable against Plaintiff if, to the extent that, and insofar as, said laws and any of the provisions thereof are interpreted, applied, enforced or given effect so as to hinder, interfere with, impede, prevent, restrain or prohibit Plaintiff from harvesting its crops grown in Arizona, placing them loose, in bulk, in trailers and transporting them across the state line of Arizona into the State of California, to processing and packing facilities of Plaintiff in California for processing and packing in standard containers like those in use in Arizona, preparatory to shipment and shipment to buyers or consignees in the various states of the nation and foreign commerce.

(2) That a mandatory injunction issue, restraining and enjoining the Defendants, and each of them, and their deputies, agents, servants, employees, and attorneys, and all persons in active concert and participation with them, from in any manner, either directly or indirectly, threatening, ordering, attempting or acting, (a) to hinder, interfere with, impede, restrain, prohibit or prevent the Plaintiff from harvesting its crops of cantaloupes, grown by Plaintiff in the State of Arizona, in, around or about Parker, Arizona, and from placing the same loose

in trailers, in bulk, and transporting them across the state line of Arizona into the State of California for processing and packing in standard containers like those in use in Arizona, preparatory to shipment and shipment to buyers or consignees in the various states of the nation and foreign commerce; (b) to seize and take possession of any crops so harvested, loaded or transported; (c) to take any action to forfeit bonds or to deny or revoke licenses of Plaintiff because of such harvesting, loading or transportation of such crops; or (d) to take any other action penalizing, injuring or damaging Plaintiff on account of or because of such harvesting, loading or transporting.

(3) That, pending a hearing upon the merits of this case, a preliminary injunction issue, restraining and enjoining the Defendants, and each of them, and their deputies, agents, servants, employees, and attorneys, and all persons in active concert and participation with them, from in any manner, either directly or indirectly, threatening, ordering, attempting or acting (a) to hinder, interfere with, impede, restrain, prohibit or prevent the Plaintiff from harvesting its crop of cantaloupes, grown by Plaintiff in the State of Arizona, in, around or about Parker, Arizona, and from placing the same loose in trailers, in bulk, and transporting them across the state line of Arizona into the State of California for processing and packing in standard containers like those in use in Arizona, preparatory to shipment and shipment to buyers or consignees in the various states of the nation and foreign commerce; (b) to seize and take possession of any crops so harvested, loaded or transported; (c) to take any action to forfeit bonds or to deny or revoke licenses of Plaintiff because of such harvesting, loading or transportation of such

crops; or (d) to take any other action penalizing, injuring or damaging Plaintiff on account or because of such harvesting, loading or transporting.

(4) That pending hearing upon the preliminary injunction and notice of the same as required by law, a temporary restraining order issue, without notice, restraining and enjoining the Defendants, and each of them, and their deputies, agents, servants, employees and attorneys, and all persons in active concert and participation with them, from in any manner, either directly or indirectly, threatening, ordering, attempting or acting (a) to hinder, interfere with, impede, restrain, prohibit or prevent the Plaintiff from harvesting its crops of cantaloupes, grown by Plaintiff in the State of Arizona, in, around or about Parker, Arizona, and from placing the same loose in trailers and transporting them across the state line of Arizona into the State of California for processing and packing in standard containers like those in use in Arizona, preparatory to shipment and shipment to buyers or consignees in the various states of the nation and foreign commerce; (b) to seize and take possession of any crops so harvested, loaded or transported; (c) to take any action to forfeit bonds or to deny or revoke licenses of Plaintiff because of such harvesting, loading or transportation of such crops; or (d) to take any other action penalizing, injuring or damaging Plaintiff on account or because of such harvesting, loading or transporting.

(5) That a three-judge district court be convened as required by Section 2281, Title 28, United States Code, for the hearing of this action and of the Plaintiff's demand for a preliminary injunction; and that the Chief Judge of the United States Court of Appeals for the Ninth Circuit be notified pursuant to Section

2284, Title 28, United States Code, of the presentation of Plaintiff's application for injunction, in order that the necessary designation of judges for said Court may be made.

EVANS, KITCHEL & JENCKES
By James M. Bush
JAMES M. BUSH
363 North First Avenue
Phoenix, Arizona 85003

ABRAMSON & CHURCH
By Jacob Abramson
315 Crocker-Citizens Bank Bldg.
Salinas, California 93901
Attorneys for Bruce Church, Inc.

STATE OF ARIZONA)
County of Maricopa) ss.

DAVID R. GIPE, being duly sworn, deposes and says that he resides at 1150 Avenue "C", Yuma, County of Yuma, Arizona; that he is the Assistant Secretary of BRUCE CHURCH, INC., Plaintiff herein; and that he has read the foregoing complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

David R. Gipe
DAVID R. GIPE

Subscribed and sworn to before me this 27th day of May, 1968.

James M. Bush
Notary Public

My Commission Expires July 14, 1968.

"Exhibit A to the Complaint — The Story of the Bruce Church, Inc., Parker, Arizona Farm" is omitted from the Appendix here, but appears after page 50 infra.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRUCE CHURCH, INC., a California corporation,

Plaintiff,

vs.

L. J. PIKE, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service; and DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE and DOE TEN,

Defendants.

Civil Action
No. 6702

TEMPORARY
RESTRAINING
ORDER

This cause came on to be heard on Plaintiff's verified complaint and it appearing to the court that the Defendants and each of them are committing acts and are about to commit acts as set forth in Plaintiff's complaint and will continue to do so unless restrained by an order of this court, and that immediate and irreparable injury, loss or damage will result to Plaintiff before notice can be given and the Defendants and their attorney or attorneys can be heard in opposition to the granting of a temporary restraining order, in that Plaintiff is growing a crop of cantaloupes on its farm at Parker, Arizona, and such crop will be ready for harvesting on or about the 10th of June, 1968, and such cantaloupes are a highly perishable crop and must be harvested, processed and packed for shipment promptly on reaching maturity, and if this is not done the crop will spoil and become worthless, and there are no facilities for the processing and packing of the said crop at the Plaintiff's farm

at Parker, Arizona, but such facilities are available to and are under lease to Plaintiff at Blythe, California, and Defendants have ordered and threatened to hinder, interfere with, impede, restrain, prohibit or prevent the Plaintiff from harvesting its crop of cantaloupes grown by Plaintiff in the State of Arizona in, around or about Parker, Arizona, and from placing the same loose, in bulk, in trailers and transporting them across the State Line of Arizona into the State of California for processing and packing in standard containers, like those in use in Arizona, preparatory to shipment and shipment to buyers or consignees in the various states of the nation and foreign commerce, and by such action Defendants would prevent Plaintiff from processing and packing such crops promptly upon their reaching maturity, thereby resulting in the loss of such crops due to spoilage;

IT IS ORDERED that Defendants L. J. PIKE, DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE, AND DOE TEN, and each of them and their deputies, agents, servants, employees, and attorneys, and all persons in active concert and participation with them be and are hereby restrained from in any manner, either directly or indirectly threatening, ordering, attempting or acting (a) to hinder, interfere with, impede, restrain, prohibit or prevent the Plaintiff from harvesting its crops of cantaloupes, grown by Plaintiff in the State of Arizona, in, around or about Parker, Arizona, and from placing the same loose in trailers and transporting them across the state line of Arizona into the State of California for processing and packing in standard containers like those in use in Arizona, preparatory to shipment and shipment to buyers or consignees in the various states of the nation and foreign commerce; (b) to seize and take possession of any crops so harvested, loaded or transported; (c) to take any action to forfeit bonds or to deny or revoke licenses of Plaintiff because of such harvesting, loading or transportation of such crops; or

(d) to take any other action penalizing, injuring or damaging Plaintiff on account or because of such harvesting, loading or transporting; and it is further

ORDERED that this order expire within 10 days after entry unless within such time the order for good cause shown is extended, or unless the Defendants consent that it may be extended for a longer period; and it is further

ORDERED, that Plaintiff's motion for a preliminary injunction be set down for hearing on the 7th day of June, 1968, at 9 o'clock a.m., at Court Room #1, U.S. Court House, Phoenix, and it is further

ORDERED that copies of this order and of Plaintiff's complaint, together with proper summons issued by the Clerk of this Court, be immediately served by the United States Marshall upon the Defendants.

DONE IN OPEN COURT this 27th day of May, 1968 at 5:00 o'clock p.m.

Walter E. Craig
Judge of the United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRUCE CHURCH, INC., a California corporation, Plaintiff, v. L. J. PIKE, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, et al., Defendants.	No. Civ-6702 Phx. ANSWER

For its Answer, the defendant admits, denies and alleges as follows:

I

The defendant admits that the amount in controversy in this action exceeds the sum of Ten Thousand ($10,000.00) Dollars, in that the plaintiff would have suffered in excess of that amount had it not been able to ship its 1968 crop. The defendant denies that the conduct of which the plaintiff complains violates any provision of the United States Constitution.

II

Admits that the plaintiff is a corporation incorporated under the laws of the State of California and has its principal place of business in the State of California. Admits that the defendant, L. J. PIKE, is a citizen of the State of Arizona and is the Supervisor of Inspection of the State of Arizona Fruit and Vegetable Standardization Service.

III

Denies the allegations of Paragraph III of the Complaint.

IV

Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph IV of the Complaint and therefore denies the same.

V

Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph V of the Complaint and therefore denies the same.

VI

Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph VI of the Complaint and therefore denies the same.

VII

Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph VII of the Complaint and therefore denies the same.

VIII

Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph VIII of the Complaint and therefore denies the same.

IX

Admits that the relevant provisions of Arizona's Fruit and Vegetable Standardization laws are as cited by Paragraph IX of the Complaint. Admits that the defendant is charged with the responsibility of enforcing, and intends to enforce, the provisions of Arizona's Fruit and Vegetable Standardization laws.

X

Admits that the cited sections of the California Agriculture Code pertain to standardization, and that the State of California has standardization laws which apply to cantaloupe crops grown

in that State and processed and packed for shipment in that State. Denies the balance of the allegations of Paragraph X of the Complaint.

XI

Admits that the defendant takes the position that the Arizona Fruit and Vegetable Standardization laws prohibit the transportation of cantaloupes loose in trailers across the State line where they cannot be packed under the supervision of Arizona's inspectors. Denies that the plaintiff has a constitutional right to transport its cantaloupes grown at Parker, Arizona, loose in trailers across the State line for the purpose of having them packed in the State of California. Denies that the Arizona Fruit and Vegetable Standardization laws, insofar as they prohibit the transportation of cantaloupes loose in trailers across state lines for processing and packing in another state, constitute an unreasonable and undue burden upon, and an obstruction of, interstate commerce in violation of the "commerce clause," Article 1, Section 8, of the Constitution of the United States. Denies that the Congress of the United States or any other Federal entity has entered into and pre-empted the field in respect of regulating the containerization requirements in connection with packaging, transporting, shipping or handling of agricultural products and commodities in interstate commerce.

XII

Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph XII of the Complaint and therefore denies the same.

XIII

Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph XIII of the Complaint and therefore denies the same.

XIV

Admits that the plaintiff proposes to take the products here involved out of the State of Arizona for processing and packing. Denies the balance of the allegations of Paragraph XIV of the Complaint.

XV

Denies the allegations of Paragraph XV of the Complaint.

XVI

Denies the allegations of Paragraph XVI of the Complaint.

XVII

Denies the allegations of Paragraph XVII of the Complaint.

XVIII

Denies all allegations of the Complaint not hereinabove specifically admitted or denied.

WHEREFORE, defendant prays:

1. That the Court after hearing ORDER, ADJUDGE and DECREE that the provisions of the Arizona Fruit and Vegetable Standardization Laws are not violative of plaintiff's rights under the Constitution and laws of the United States in preventing the plaintiff from harvesting the crops grown in Arizona, placing them loose, in bulk, in trailers and transporting them across the State line of Arizona into the State of California for purposes of processing them and packing them in California.

2. That after hearing, the Court dissolve the preliminary injunction against the defendant, entered hereinbefore.

3. That the Court award the defendant its costs incurred in defending this action.

4. That the defendant have such other and further relief as the Court deems just in the premises.

DARRELL F. SMITH
Attorney General of the State of Arizona

By /s/ Thomas A. Miller
Thomas A. Miller
Special Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007

JENNINGS, STROUSS, SALMON & TRASK

By /s/ Riney B. Salmon
Riney B. Salmon

By /s/ Rex E. Lee
Special Counsel
111 W. Monroe
Phoenix, Arizona

STATE OF ARIZONA)
County of Maricopa) ss.

L. J. PIKE, being duly sworn, deposes and says that:

He is the Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service; and that he has read the foregoing Answer and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ L. J. Pike
L. J. Pike

SUBSCRIBED AND SWORN to before me this 24 day of June, 1968.

.....
Notary Public

My commission expires:

.....

Copy of the foregoing Answer
mailed this ..... day of June, 1968, to:
James M. Bush
Evans, Kitchel & Jenckes
363 North First Avenue
Phoenix, Arizona 85003

and

Jacob Abramson
Abramson & Church
315 Crocker-Citizens Bank Building
Salinas, California 93901
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRUCE CHURCH, INC., a California corporation, Plaintiff, -vs- L. J. PIKE, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, et al., Defendants.	No. Civ.-6702 Phx. STIPULATION OF FACTS

Plaintiff herein, BRUCE CHURCH, INC., a California corporation, and Defendant herein L. J. PIKE, by and through their respective counsel in this action, do hereby make the following Stipulation of Facts:

I

This action arises under the Commerce Clause, Article I, Section 8, of the Constitution of the United States, and the Supremacy Clause, Article VI, of the Constitution of the United States. The value of the right of Plaintiff, derived from Federal law, to engage in interstate transportation of its own products, free from any undue or unreasonable restraints by the Defendants, exceeds, exclusive of interest and costs, the sum of $10,000.00, and the amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs. The Court has jurisdiction over the subject matter and all necessary parties.

II

Plaintiff is a corporation incorporated under the laws of the State of California and has its principal place of business in the State of California.

The Defendant L. J. PIKE is a citizen of the State of Arizona and is the Supervisor of Inspection of the State of Arizona Fruit and Vegetable Standardization Service. In this capacity he holds the chief executive office in this department of the government of the State of Arizona. He has been a member of the Service since 1936, becoming acting Supervisor in 1961 and Supervisor in 1964.

III

This suit is of a civil nature and is brought for the purposes of:

A. Obtaining a declaratory judgment, as more particularly set forth in plaintiff's complaint, that the State of Arizona Fruit and Vegetable Standardization laws, Arizona Revised Statutes, Title 3, Chapter 3, Article 4, cited in the complaint are unreasonable, arbitrary, capricious, unconstitutional and unenforceable if, to the extent that, and insofar as said laws are interpreted, applied, enforced or given effect so as to hinder, prevent, restrain or prohibit Plaintiff from harvesting its crops of cantaloupes, grown by Plaintiff in the State of Arizona in, around and about Parker, Arizona, placing the harvested cantaloupes loose in trailers and transporting said crops so loaded on trailers by truck across the state line of Arizona into the State of California to Blythe for processing, packing and shipping in standard containers to markets throughout the nation.

B. Obtaining an order restraining and enjoining the Defendants, and each of them, from threatening, attempting or acting to hinder, interfere with, impede, prevent, restrain or prohibit the Plaintiff from harvesting, loading, and transporting its cantaloupe crops in the manner and for the purpose aforesaid, across the state line of Arizona into the State of California.

IV

If called to testify, Mr. O. D. Miller of Phoenix, Arizona, would testify as follows:

A. That he has been active since the 1920s in local and national affairs pertaining to the growing, packing, and shipping of fruits and vegetables, having served, among other positions, as President of the United Fresh Fruit and Vegetable Association, a national organization, in 1945.

B. That he was a co-author of the Arizona Fruit and Vegetable Standardization Act, enacted by the Arizona State Legislature in 1929.

C. That prior to the enactment of the Fruit and Vegetable Standardization Act in 1929, there was not as great a degree of uniformity in quality, size, and type of pack of fruits and vegetables shipped from the State of Arizona as there is today. Poor quality produce shipped by one producer often had an adverse impact upon the reputation of other shippers within the State. Shippers desiring to maintain a reputation for quality produce often encountered difficulties in maintaining such a reputation because of the poor quality of produce shipped by other packers within the State. Accordingly, the purposes for the enactment of Arizona's Fruit and Vegetable Standardization Act were to promote and develop Arizona fruits and vegetables in interstate and foreign commerce and to enhance the return to the producers of fruits and vegetables within this State. The Act has been successful in achieving its purposes.

V

Plaintiff is at the present time and has for many years past been engaged in the business of growing, harvesting, transporting, processing, packing, and shipping fruits and vegetables at numerous farm locations in the states of Arizona and California for sale in markets throughout the Nation. Almost all its products are sold in interstate and foreign commerce. Company headquarters in the State of California are at Salinas, and in the State of Arizona, at Yuma. The cropping program in both states is similar; that is to say, the same kind of agri-

cultural commodities are grown in both states. A continuing and adequate supply of produce is necessary for good customer relations. The Company is diversified in agricultural field crops, cotton and a number of affiliated crops, that tend to build the soil and maintain the farm unit in good state of productivity.

VI

If called to testify, officers of plaintiff would testify as follows:

A. The Plaintiff's operations are organized and planned so as to provide a continuous supply of agricultural products to its buyers throughout the country. By taking advantage of growing seasons in different parts of the West, Bruce Church, Inc., is able to supply produce of various types, including cantaloupes, to its buyers over periods of several months, whereas, if operations were concentrated in one locality, each type of crop would mature all at one time and would therefore reach the market all at one time. By conducting its operations in several localities in different states, Bruce Church, Inc., is able not only to produce greater quantities of agricultural commodities, but it is also able to spread out the supply more evenly so as to avoid to some extent the ups and downs of the produce market. This spreading-out of supplies is to the advantage not only of Bruce Church, Inc., but also to the buyers and to the ultimate consumers throughout the nation, since price fluctuations at all levels are thereby reduced.

B. In order to conduct business-like operations, it is necessary for Bruce Church, Inc. to plan and utilize facilities in the most economical manner. The crops can only be grown where the land and the climate are suitable and fit in with the overall marketing plans of Plaintiff. In order to achieve the above-mentioned spreading-out of harvest times, the crops must be grown in diverse areas. On the other hand, it is possible in some situations to locate packing and processing facilities in a centralized location so as to handle the crops from several surrounding

growing areas. If each crop grown at each separate location had to be processed and packed at the growing site, it would not be economically feasible to provide the large, well-equipped packing and processing facilities which are necessary to insure that the produce reaching the market is of the highest quality. Not only would the facilities of necessity be less refined, but also Plaintiff would unnecessarily be subjected to the vagaries of the migrant labor force which travels throughout the western states following the crop harvests. If its crops were packed and processed separately at each growing site, Plaintiff would be unable to train and retain the highly skilled labor force that is necessary in inspecting, handling, processing and packing its commodities. However, where two or more growing areas are close enough to a central location so that the crops can be transported to that central location for processing and packing, it then becomes economically feasible to construct a large, well-equipped packing and processing facility which can be used to process crops maturing at different times in different areas. Not only would this insure the availability of sophisticated equipment, but also it would make it possible for plaintiff to train and retain highly skilled labor over a long period of time in order to handle properly the several crops and harvests which could be transported to the central packing facility.

VII

In the State of Arizona, Plaintiff has carried on and is carrying on operations at various locations, including, Parker, Yuma, Harquahala Valley, Aguila, and Horne. In the State of California, Plaintiff has carried on and is carrying on operations at various locations, including the Salinas Valley, San Joaquin Valley, Imperial Valley and Blythe. In each of these locations, Plaintiff owns or leases lands which it farms. Presently under cultivation in all of the company's locations are 25,000 to 30,000 acres. Approximately 15,000 are in the State

of Arizona. Plaintiff has maintained and does now maintain processing and packing sheds, equipment and facilities of various kinds required in connection with its operations at the above-mentioned locations, but Plaintiff does not have at the present time at Parker, Arizona, processing or packing facilities required for the handling of cantaloupe crops or preparing them for shipment to market in interstate commerce.

The Company has carried on farming activities in the State of Arizona for many years and has taken an active part in research programs of the College of Agriculture and Extension Service of the University of Arizona and in the development of fertility studies of numerous crops, including cantaloupes, lettuce, citrus, and grapes. It is regarded in the industry as a company maintaining high standards of quality and service. Defendant himself has described Plaintiff as "one of the finest in the business." (Def. Depo. June 5, 1968, p. 63, l. 12-13.)

VIII

On or about February 5, 1964, Plaintiff entered into a certain Agricultural Lease with the Secretary of Interior of the United States of America, as Lessor, the Commissioner of Indian Affairs, the Colorado River Indian Agency and the Colorado River Indian Tribes, pursuant to which Plaintiff undertook to develop approximately 6,400 acres of uncultivated, arid lands in the Colorado River Indian Reservation, located at Parker, Arizona. At the time the lease was signed, the land was arid wasteland covered with mesquite. Under the lease, which is for a term of 25 years, Plaintiff, in addition to being required to pay rent in excess of $1,500,000.00, undertook to improve and develop the land by extensive clearing operations, leveling the land, and constructing a complex, modern and efficient irrigation system so that crops could be grown on the land. Continuously since taking possession of the lands pursuant to the lease, Plaintiff has been engaged in the planning, improving, developing

and operating of the lands. In the process of improving and developing the lands, Plaintiff has been required to carry on extensive and costly operations by chain dragging the land with tractors to clear off the mesquite, chiseling out the roots and burning the mountains of mesquite; moving approximately six million (6,000,000) cubic yards of dirt to create a uniform level soil structure several feet thick in each of the 320 fields into which the farm was surveyed; constructing a five-foot deep, concrete-lined canal approximately three miles in length to carry Colorado River water to the fields; laying approximately 41 miles of poured-in-place concrete irrigation pipe throughout the farm; and finishing the land by grading it, an operation which involved the movement of approximately another one million (1,000,000) cubic yards of dirt. In addition, Plaintiff has constructed on the land implement sheds and other service buildings. Plaintiff has also built six two-bedroom houses and facilities for 22 house trailers for its employees. Plaintiff, in connection with the development and operation of the farm has furnished employment to members of the Colorado River Indian Tribes as well as others residing in the Parker area. Plaintiff's operations and activities in this connection have involved and will continue to involve the expenditure of very considerable sums, amounting to between 3 and 3½ million dollars. Attached hereto and made a part hereof as Exhibit "A" is a folder prepared by Plaintiff as part of its recent dedication ceremonies, which contains a pictorial representation of the work accomplished at Parker.

IX

As a result of its work and efforts as aforesaid, Plaintiff has succeeded in accomplishing a state of development originally projected for five years within a period of about four years. Approximately 6,300 acres of crops are under cultivation this year. These include about 2,200 acres of barley, 1,700 acres of sorghum, 800 acres of cotton, 80 acres of onions, 40 acres

of Bermuda seed, about 1,000 acres of alfalfa. Also included are 501 acres of cantaloupes which matured this year on or about June 10, 1968, and were harvested by Plaintiff following the issuance of the temporary restraining order and preliminary injunction in this proceeding. The cantaloupe crop, which comes once a year, matures about June 10. The planting takes place usually in January, sometimes in February, and requires three to four months for growth. The period of harvest generally lasts about three weeks. Cantaloupes are a highly perishable crop and must be harvested, processed and packed for shipment promptly on reaching maturity or the crops will spoil and become worthless. All but a very small portion of the Plaintiff's cantaloupe crops are marketed outside the State of Arizona and move in interstate commerce. The gross sales value of the Parker crop for 1968 is approximately $700,000.00. Last year Plaintiff's crop amounted to 400 acres, and involved 100,355 crates with a gross sales price of $598,728.26. The cantaloupes grown by Plaintiff at Parker as well as elsewhere are of exceptional high quality. Other districts in which Plaintiff grows cantaloupe crops are the Yuma District in Arizona and the Central Valley of California, the Huron District and this year at Mendota, California.

X

Plaintiff has for many years been engaged in the business of selling and shipping cantaloupes to buyers and receivers in various states of the United States and Canada, to jobbers, wholesalers, chain stores, and the cantaloupe crops grown by the Plaintiff at Parker are grown for the purpose of supplying the requirements of its customers and the ultimate consumer, the general public, throughout the nation. If called to testify, officers of Plaintiff and other witnesses would testify that loss of Plaintiff's cantaloupe crop at Parker would not only cause irreparable damage and injury to the Plaintiff in its re-

lations with its customers, but would also cause serious injury and damage to Plaintiff in its competitive position in the cantaloupe markets of the nation and would result in substantially diminished cantaloupe crops in interstate markets.

XI

Plaintiff does not have at the present time, at its farm at Parker, the processing and packing facilities needed for the handling of cantaloupe crops and preparing them for shipment to market in interstate commerce. To establish such facilities suitable to serve the Parker ranch would require bringing in rail siding for about 20 miles. It is estimated that the detailed engineering involved, cost of procuring land, putting on a rail siding and the work involved in the construction of a facility or shed building sufficient in size to handle the crop and obtaining and installing needed equipment, including bins, dumps, sorting tables, conveyors, presses, lidding machines, crate racks, electric motors, waxers, bushers, loading bins, cull storage bins, cull conveyors, skids, would run in the neighborhood of $200,000.00. The better and more elaborate the facilities are, the better the job which can be done in the processing and packing of the product for market. It would not be feasible to build a shed which would be served by truck rather than by rail. If the trackage, land easements for drainage, siding and equipment could be obtained, the planning and construction would require a number of months, and it would take about six months for the physical job of constructing the needed facilities.

XII

There are two other cantaloupe growers and shippers at the present time in the Parker District, namely, the Garin Company and the Tri-Produce Company. The Garin Company and Tri-Produce also grow or have grown cantaloupes in certain districts in California. In addition, Westside Growers & Shippers

formerly grew cantaloupes in the Parker area. The acreages which these companies have had devoted to cantaloupes in the Parker area during the years in which they have grown cantaloupes in that area are as follows:

The Garin Company

1963	550 Acres
1964	550 Acres
1965	496 Acres
1966	520 Acres
1967	510 Acres
1968	580 Acres

Westside Growers & Shippers

1964	550 Acres
1965	550 Acres
1966	740 Acres

Tri-Produce Company

1967	645 Acres
1968	650 Acres

During each of the above designated years, the Garin Company, Westside Growers & Shippers and the Tri-Produce Company packed their cantaloupes in sheds owned or controlled by them in or near Parker, Arizona, on the Arizona side of the State line. The Garin Company and Tri-Produce, which continue to grow cantaloupes in the Parker District, have acquired excellent reputations as cantaloupe growers and shippers and both pack their cantaloupes according to standards comparable to those of the plaintiff. The two sheds which service the cantaloupe crops of the Tri-Produce Company and the Garin Company are the only packing sheds suitable for handling cantaloupe crops of this size in the Parker area on the Arizona side of the State line. Their facilities, however, are not available to Plaintiff. The produce business is a highly competitive business and cantaloupe growers are in direct competition with one another. Apart from

this, a cantaloupe packing shed is in full operation at capacity during cantaloupe harvest season, from early morning until late after dark, and the grower requires exclusive use of his facilities during such periods. Therefore, it is not feasible to share facilities with another company, or have another company do your packing.

Among the different shippers of cantaloupes, there exist differences of opinion as to how best to pack cantaloupes in order to make them most attractive and in order most effectively to enhance their marketability. Shippers who pack within the State of Arizona or the State of California are subject to the requirements of the inspection service of the State within which they pack; within the bounds of those requirements, however, some shippers go to greater lengths than other shippers in, for example, sorting for color, uniformity of size, and similar factors.

In addition to physical defects, such as softness, sponginess, rot, etc., some individual shippers may give greater emphasis than others to considerations such as appearance and shipping qualities, which, though they are factors separate and apart from physical defects, affect the marketability of the produce. The manner in which an individual shipper packs and the manner in which he sorts for color, uniformity of size, and similar factors, has a substantial effect upon the long-run reputation that his product attains with his buyers; this long-run reputation that the shipper's produce acquires is a matter of prime concern for a shipper such as the Bruce Church Company. This is one of the reasons why the Bruce Church Company would not even want its cantaloupes to be packed by any other company.

The actual packing of the cantaloupes, e.g., the placing of the individual melons in the containers, except in the case of shippers operating in more than one district, such as Plaintiff, Garin Company and Tri-Produce, is not usually done by

full time employees of the shipper, but by transient workmen who customarily work for one shipper during the time that that shipper's crop is being harvested and shipped, and then move on and pack at another shed which serves a crop maturing later in the season. In a given season most of these packers work both in Arizona and in California.

Although there are no packing facilities available to Plaintiff at Parker, Plaintiff does have such facilities under lease at Blythe, California, a distance of approximately 31 miles from the farm at Parker. It is approximately 26 miles from Parker to the State line, and then 5 miles into California to Blythe. In Plaintiff's experience, the facilities at Blythe afford a centralized facility for the most practical, economical and efficient handling of the company's cantaloupe crops in the general area, including the Parker District. If called to testify, officers of Plaintiff would testify that if Plaintiff were required to construct facilities at Parker, its costs would be materially increased and that a centralized facility makes it possible to have better quality control as well as more economical processing, with the end result being a better product at a lower cost to the consumer. The facilities at Blythe were used by Plaintiff in the year 1966 for the processing and packing of its cantaloupe crops grown at Parker in 1966, that being the first year in which such crops had been grown by Plaintiff at the Parker farm, and also again last year, 1967, for the packing of 467 acres of Plaintiff's cantaloupes. Such facilities would not be adequate to handle the cantaloupe production from 1,000 acres, in the event Plaintiff should so increase its production acreage, which it hopes to do. In the event Plaintiff should so increase its cantaloupe production acreage, packing shed facilities sufficient to handle a cantaloupe crop of this magnitude would then be constructed at a location that would be in Plaintiff's economic best interest, considering its total farming operations. The Plaintiff has given some thought and study

to this matter, but has not yet determined whether it would be in the economic best interest of the Plaintiff to locate these facilities at Parker, Blythe or elsewhere. The facilities, if and when built, would be a centralized facility prepared to handle not only cantaloupes but other agricultural products grown by Plaintiff in the general area.

XIII

The cantaloupe crops grown by Plaintiff in 1966 and 1967 in the Parker district and in 1968 after the issuance of the temporary restraining order and preliminary injunction in this matter, were harvested, loaded loose in trailers and transported to Blythe for processing and packing using generally the same type of equipment and processing and packing methods as are used in Arizona. There they underwent the same basic inspection procedure described below, including a rigid inspection by Plaintiff's own personnel as well, were carefully sorted, processed and packed in standard containers, approved in Arizona as well as California, and shipped in interstate commerce. The standard containers used by Plaintiff are the same in whatever district or state, or locations, it operates. There are three sizes of cartons, each being of fixed dimensions, each being assigned a tariff number which is the same in both states, and each being officially approved for use by both the States of California and Arizona. The crate most commonly used is in evidence as Plaintiff's Exhibit No. 1 in the depositions.

Inspectors of the Arizona Fruit and Vegetable Standardization Service are in the fields where the harvest is in process, they inspect the cantaloupes and each day issue pickle worm inspection certificates. This is the same pickle worm inspection which is made with respect to all cantaloupes picked in Arizona and shipped to California and similarly certificated. The inspection certificates given Plaintiff in this manner were given for delivery by Plaintiff to the State of California inspector, stationed on

the Arizona side of the border, at the time the cantaloupes were taken across the state line into California. This has been the daily procedure during each of the past two years. The transportation of said cantaloupe crops, in the manner described, across the state line of Arizona into California, has been accomplished with the knowledge of and without objection or complaint by Defendant, his agents or employees.

If called to testify, officers of Plaintiff would testify that this procedure and practice of inspecting, transporting to Blythe and packing and processing there by Plaintiff was carried out as to grade, quality and pack in the same manner and with the same high standard as its cantaloupe production handled in Arizona at Yuma.

The cantaloupes are brought into the packing shed in trailers. They are then sorted and placed in packing bins. The State Inspectors circulate in and out of the shed throughout the day, on an indeterminate schedule. They will appear unannounced several times during the day, each day, and will inspect the cantaloupes in the bins for defects. If the cantaloupes are running of good quality on a given day, the inspectors will appear with lesser frequency. If the run is of marginal quality, that is with a larger amount of defects, the inspectors appear with greater frequency. If they like what they see, the inspectors will turn and leave, if they do not like what they see, or if the produce is close to tolerance, they will take a "hard" look and inspect very closely. They may even go into the car or truck which has been loaded and visually inspect the cantaloupes in the crates. If they find a condition to exist which goes beyond the tolerance, they will "red tag" the load — even after it has been packed and made ready for shipment. In such case the load must be reconditioned to meet minimum standards or dumped.

The inspectors check not only for defects, but also for sugar content, particularly if the sugar content is running low in the

area at the time. They will cut the cantaloupes, squeeze, take samples and test for total sugar. If the cantaloupes do not make grade the inspectors will hold up the operation and give the shipper an opportunity to get rid of the deficient cantaloupes and bring the produce up to tolerance. If the condition is questionable, the inspectors may go out and check the produce already in the crates and may even "red tag" them.

These same basic procedural steps are generally followed both in Arizona and in California.

In years past, various other growers and shippers, with the knowledge of and without objection or complaint by Defendant, his agents or employees, have transported cantaloupe crops, as well as other agricultural crops, in bulk across the state line of Arizona into the State of California for processing, packing and shipment in interstate commerce. Attached hereto and made a part hereof as Exhibit "B" is a document showing produce grown in the Parker District of Arizona in past years and taken across the state line in bulk to Blythe, California, for processing and packing there. The list was prepared by Mr. Pike on the basis of statistics appearing in the Service's official annual reports for the years in question. The list was identified as Defendant's Exhibit No. 1 in Mr. Pike's deposition on file herein and the annual reports were identified as Defendant's Exhibits 5 through 18, respectively, also on file herein. The list shows only watermelon, honeydew and cantaloupe crops, by acreages, although lettuce also was a commodity similarly handled. In the years covered (1953-1967) several different growers and shippers harvested their Parker crops and transported them across the State line into Blythe for packing and shipment in interstate commerce, among them S. L. Eaton Farms, Martin Produce Co., Independent, Garin Company, Noroian Farms, Nish Noroian Farms. The existence of this practice prior to the time Plaintiff commenced operations at Parker, was noted, and reported without objection, in the official

reports of the Defendant's department for the years in question. (Def. Ex. 5-18). Although not reflected on the list, the practice commenced earlier as appears from a letter dated September 27, 1968, from the Land Operations Officer, Bureau of Indian Affairs, Parker, Arizona, which letter is attached hereto as Exhibit "C" and by reference made a part hereof. Over the years, mixed melons, carrots, citrus, onions, barley, milo and alfalfa have been moved in bulk from the Parker Valley or other Arizona Districts into California through Blythe.

In January of 1968, Plaintiff undertook to plant and grow another cantaloupe crop to mature about June 10, 1968, which it proposed to harvest, place in trailers and transport in bulk to Blythe for processing, packing and shipment in accordance with the practice of prior years.

On March 22, 1968, by written notice to Plaintiff, Defendant informed Plaintiff he would not permit Plaintiff to transport its cantaloupe crops across the state line of Arizona into California for processing and packing there as above described. At the time notice was given, Defendant was aware that Plaintiff did not have processing or packing facilities in Parker. Defendant did thereafter, pursuant to his notice, prevent and prohibit such loading and transportation by Plaintiff of its cantaloupe crops across the state line of Arizona into California in the manner and for the purpose aforesaid.

XIV

Although the quality of cantaloupes grown in Arizona varies from year to year and from district to district according to growing conditions existing at the time, cantaloupes grown at Parker are considered ordinarily to be of higher quality than those grown in other districts in Arizona.

A certain segment of produce buyers known as "ground Buyers" usually inspect the individual crop and place their orders according to district, that is, specifying a particular district from

which the order is to be filled. Other buyers, known in the industry as "the wire trade," usually do not specify the district from which the order is to be filled.

XV

The State of California also has standardization laws which apply to cantaloupe crops grown in that state and processed and packed for shipment in that state. These are contained in the California Agricultural Code, Sections 3, 42941, 43251, 45633, 45663, 45664 and other sections. Among the provisions of such Code are provisions (Sections 45633, 45663 and 45664) which provide for packing of cantaloupes in standard containers of the same sizes and descriptions as those prescribed in Arizona. These standard containers are of uniform dimensions and specifications adopted by the pertinent authorities as part of a plan to achieve uniformity among growers and shippers in the Western States generally. They are so used by growers, many of whom carry out the same growing, packing and shipping operations in the several states, such as Arizona and California, as does Plaintiff. Such growers supply the same customers with the same agricultural products, packed in the same uniform containers, from both the States of Arizona and California. The equipment used by such growers in their processing and packing operations in both States is the same, geared to handling the same uniform containers. There exists generally a close liaison between the California produce industry and the Arizona produce industry. Some growers and shippers are Arizona residents operating in Arizona and California and vice versa. For many years, growers in the Bard Valley of California, including growers of cantaloupes, Plaintiff among them, have been transporting their products across the state line of California into Yuma on the Arizona side of the Colorado River for processing, packing and shipment to interstate markets, in the same manner as has been done from Parker to Blythe. This has been known to Defendant. The conditions and stand-

ards provided by the Standardization Laws of Arizona and California are likewise based on the same primary objectives, namely, to avoid deceptive packs.

XVI

Accordingly, a case or actual controversy has arisen and now exists between Plaintiff and the Defendant, and each of them, in the following respects:

A. Defendant contends that:

(1) The regulatory provisions of the Arizona Fruit and Vegetable Standardization Act constitute a valid and permissible exercise of the police power reserved to the State of Arizona and do not contravene any provisions of the United States Constitution.

(2) Congress has not enacted legislation which has pre-empted the field of regulating the packaging and handling of cantaloupes prior to their shipment in interstate commerce.

(3) The packing of fruits and vegetables occurs at a stage prior to the time that such fruits and vegetables have entered the stream of interstate commerce; the regulation of the packing of fruits and vegetables may therefore be undertaken by a state free from commerce clause strictures.

B. Plaintiff contends that:

(1)It has a right under the Constitution and laws of the United States to harvest its crops of cantaloupes grown at Parker, Arizona, place them loose in trailers, and so transport them across the state line to its facilities at Blythe, California, for processing and packing in the manner and under the conditions heretofore described;

(2) Any interpretation, application or enforcement of the Arizona Fruit and Vegetable Standardization laws in the manner proposed and threatened by Defendant would constitute an unreasonable and undue burden upon, and obstruction of, interstate commerce, in violation of the Commerce Clause, Article I,

Section 8, of the Constitution of the United States and would be violative of Plaintiff's rights thereunder as aforesaid;

(3) The Congress of the United States by various enactments, including the Agricultural Adjustment Act, of May 12, 1933, Chapter 25, Title 1, 48 Stat. 31 et. seq., Title 7 U.S. Code § 601, et seq., and subsequent amendments thereof, the Act of August 14, 1946, Chapter 966, Title II, Sections 202-208, 60 Stat. 1087, 7 U.S. Code Section 1621-1627; the Act of March 4, 1915, Chapter 158, 38 Stat. 1186, 1187, 15 U.S. Code § 234-236; the Act of August 31, 1916, Chapter 426, 39 Stat. 673-674, 15 U.S. Code, § 251-256; the Act of May 21, 1968, Chapter 664, 45 Stat. 685-687, 15 U.S. Code, § 257-257i; and other enactments has entered and pre-empted the field in respect of regulating the containerization requirements in connection with packaging, transporting, shipping or handling of agricultural products and commodities in interstate commerce, and accordingly, the state laws and regulations sought to be enforced by the Defendant herein are in derogation of the rights of the Plaintiff and are violative of the Supremacy Clause, Article VI, of the Constitution of the United States;

(4) If and to the extent that the Arizona Fruit and Vegetable Standardization Laws are interpreted, applied, given effect or enforced to prevent Plaintiff, such laws unreasonably discriminate against out-of-state processors and packers in favor of Arizona processors and packers and are unlawful and void;

(5) If and to the extent that the action threatened by Defendant or the interpretation or effect being given by him to the Arizona laws is sought to be based upon the police power of the state, that is to say the protection of the public health, safety, or welfare of the citizens of the State of Arizona, this cannot serve as any legal or valid basis for the infringement upon interstate commerce which it would effect since the crops so transported will not be returned for marketing or sale in the State

of Arizona until they have been processed and packed in compliance with the Fruit and Vegetable Standardization laws of the State of California, which have standardization requirements like those of Arizona; and

(6) If and to the extent that the action threatened by the Defendants or the interpretation or effect sought to be given by them to the Arizona laws have as their purpose and object to serve the economic interests of Arizona growers, packers and shippers to the detriment and disadvantage of those seeking to accomplish their processing, packing and shipping in the State of California under like standards and conditions, such action and such laws constitute an unreasonable discrimination against and burden upon those growers, processors and packers in interstate commerce and are unlawful and void.

(7) The acts threatened by Defendant would constitute an unlawful interference with Plaintiff's contractual relations under the contract clause of the Constitution, Article I, Section 10.

XVII

Processing and packing facilities required for the handling of Plaintiff's 1968 cantaloupe crops at Parker, Arizona, could not have been constructed by June 10, 1968, when the cantaloupe crops of this year would have reached maturity, or in sufficient time before the cantaloupe crops had to be harvested. If Plaintiff had been prevented by Defendant from transporting its cantaloupe crops across the state line loose in trailers for the purposes aforesaid in 1968, it would have resulted in a loss in gross sales this year alone in the amount of approximately $700,000.00. If called to testify, officers of Plaintiff would testify that any such conduct by Defendant in future years would cause Plaintiff loss and damage in large undetermined amounts and would cause serious interference with Plaintiff's contractual relations with the Secretary of Interior of the United States of America, as lessor, the Commissioner of Indian Affairs, the

Colorado River Agency, the Colorado River Indian Tribe, the lessor of Plaintiff's processing and packing facilities at Blythe, and with the interstate customers of Plaintiff, to whom continuity of supply is of great importance; and that such conduct will also seriously interfere with and materially impair the successful development of the Indian lands administered by the United States Department of the Interior in the Parker area, and tend to discourage and frustrate private investment in the development of these waste lands into productive farm lands.

If called to testify, officers of Plaintiff would testify that the standing of a grower in the trade is directly affected by his ability to afford a customer a continuing supply of a given product and any reduction in Plaintiff's ability to carry its Parker products to market would seriously affect its customer relations. The cantaloupe crops grown by Plaintiff at Parker represent a substantial part of the cantaloupe supplies coming out of the Parker area — approximately one-third, and if this crop is lost to Plaintiff, not only will its competitive position in the industry be damaged, but the reduced quantities of cantaloupes going to market will result in higher prices to the buyer and consumer public and, of course, Plaintiff's competitors will benefit at Plaintiff's expense from increased prices for their own products because of the diminished supplies going to market. Defendant's Exhibits No. 2 and 3 to his deposition of June 5, 1968 are lists showing the various cantaloupe growers having current acreages in other districts of Arizona.

The lease which Plaintiff has on the facilities at Blythe calls for a minimum rental guarantee of $6,000 per year. If the crop is packed at Blythe, the minimum will be considerably exceeded at the 10¢ per packed crate rate provided. If the temporary restraining order and preliminary injunction herein had not issued and Plaintiff had not been able to transport the 1968 crop to Blythe for packing, Plaintiff would have suffered the loss of the guaranteed amount and, of course, considerable loss would

have been suffered by Plaintiff's Lessor who made the lease without knowing that Defendant would seek to prevent the crop being packed at Blythe. The present lease was entered into by Plaintiff and its lessor on November 17, 1966, after the 1966 melon harvest to cover the 1967 and 1968 Blythe-Parker melon seasons. Although such lease expires in November following the 1968 melon season, officers of Plaintiff, if called to testify, would testify that it has been and presently is their plan to renew said lease and continue the use of the processing and packing facilities in Blythe unless prevented from doing so by Defendant.

XVIII

Further, in order to pack and ship its cantaloupe crops this year, it is necessary that Plaintiff have a large supply of packing crates and ice, which are inventoried at Blythe, California in advance, so as to be ready for immediate use when the crops mature and the harvest commences. Plaintiff must, of necessity, place orders for such supplies and must make further commitments as well as arranging for availability of the required railroad cars for interstate shipments if the crop is not to be lost for lack of these supplies and equipment. If Defendant is not restrained and enjoined from carrying out his orders and threats, Plaintiff will sustain heavy loss in respect of the supplies already committed for and will be placed in great jeopardy in respect of the supplies and equipment still to be obtained.

XIX

The products here involved are not being brought *into* the State of Arizona from other states, but are to be taken *out* of the State of Arizona for processing and packing.

XX

There are no administrative remedies available to Plaintiff; Plaintiff has no adequate remedy at law and will be irreparably injured, and this is a proper case for equitable relief and the

relief prayed for, if the acts of the Defendant in threatening, ordering, attempting, or acting to enforce the provisons of the Arizona Fruit and Vegetable Standardization laws against Plaintiff, so as to hinder, interfere with, impede, restrain, prohibit and prevent Plaintiff from transporting its cantaloupe crops loose in trailers across the state line of Arizona to Plaintiff's processing and packing facilities at Blythe, California, are wrongful or unlawful.

The issue here presented is a present and continuing one and will not be rendered moot by the expiration of the 1968 harvest season. Plaintiff's crop program and crop plans call for continued cantaloupe crops in the Parker district in the years to come, much or all of which Plaintiff proposes to harvest and transport across the state line into California for processing and packing as herein described. Likewise, the Defendant's prohibition thereof, as heretofore stated, is a present and continuing one, and unless restrained and enjoined by this Court, Defendant will seek to prevent such practice by Plaintiff in the future.

XXI

The Complaint herein was filed on May 27, 1968. The Answer was filed on June 24, 1968. On May 27, 1968 a Temporary Restraining Order, as prayed for, was made and issued by the Honorable Walter E. Craig, United States District Judge, and the said Order was duly served on the Defendant on May 28, 1968.

Thereafter, a three-judge court, consisting of the Honorable Charles M. Merrill, Judge, United States Court of Appeals for the Ninth Circuit, the Honorable Walter E. Craig, Judge, United States District Court for the District of Arizona, and the Honorable Carl A. Muecke, Judge, United States District Court for the District of Arizona, was convened to hear the matter of the Preliminary Injunction. Hearing thereon was had in Phoenix

on June 7, 1968. A Preliminary Injunction as prayed for was made and issued on June 7, 1968, by a unanimous court.

After the filing of the Complaint and prior to the hearing on the Preliminary Injunction, depositions were taken of David Gipe, General Manager of the Arizona operations of Plaintiff, and the Defendant L. J. Pike. The transcripts of their depositions and the Exhibits offered in connection therewith were made part of the record of the hearing on the Preliminary Injunction, and the said depositions and Exhibits, as well as the transcript of the hearing on the Preliminary Injunction (which included oral testimony of Mr. Gipe and of Thomas H. McNamara, President of Plaintiff, as well as documentary matter) are incorporated herein and made a part of this stipulation. At the time of Mr. Pike's deposition, counsel for Plaintiff asked for a copy of the minutes of a certain meeting of the Arizona Vegetable Growers Association. A copy of the minutes of the meeting of the Arizona Vegetable Growers Association, referred to in the deposition of Mr. L. J. Pike, was supplied to counsel for the Plaintiff after the deposition was concluded. Those minutes state that current legislation before the Arizona Legislature was discussed at the meeting. Two bills were discussed. The first concerned the use of DDT, and the second the bulk movement out of the State of vegetables and melons. The minutes state that the DDT bill was referred to a committee of the Association for further study, and that as to the latter bill, no formal action was taken by the Board.

Dated this 4th day of November, 1968.

ABRAMSON & CHURCH
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From range land to developed land in four years

The Story of the Bruce Church, Inc. Parker, Arizona Farm

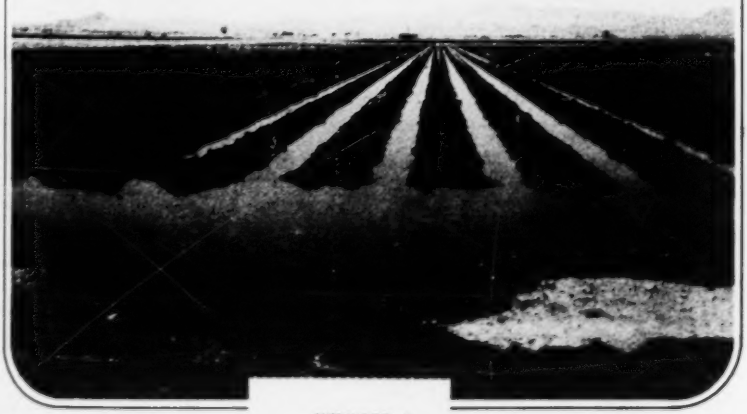
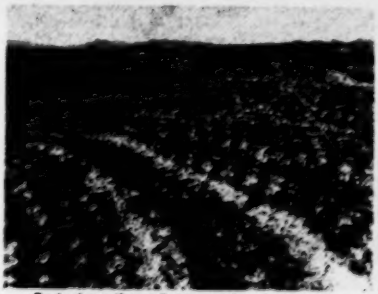


EXHIBIT A

Brushing was the first phase of land subjugation. Pairs of D-6 Crawler Tractors cleared mesquit brush by chain-dragging with 150-foot anchor chains.

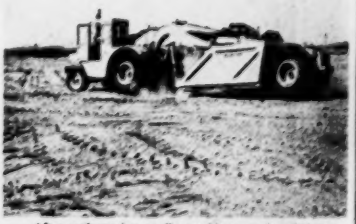
Large horizontal knives mounted on crawler tractors was used to fracture hard-pans for better water penetration of the sun-baked soil.



To develop uniform soil structures throughout the farm, over 6 million yards of dirt were moved in rough grading operations—946 yards per acre.

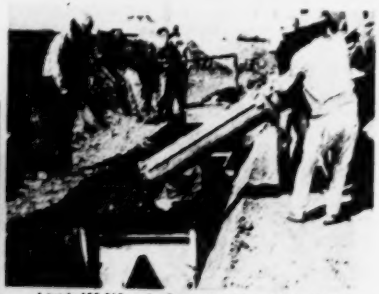
Large cuts were necessary on many parts of the farm to obtain uniform soil structures. Here, the original ground level is illustrated by this mound of earth.

Earth moving operations were carried out by large Euclid TS Machines. These machines were kept busy throughout the four-year development period.

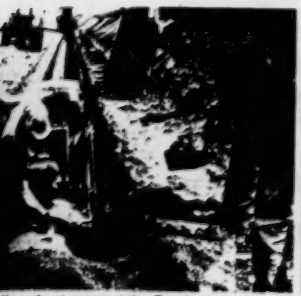


After earth moving, smaller machines were brought in to fine-grade each of the 40-acre fields, to obtain a uniform 6/10th-foot drop over 640-foot field length.

To build irrigation system, Cleveland Ditcher excavated trenches for the placement of pipe in the underground system. Shoe on bottom of ditcher shapes trench.



A total of 33,513 yards of concrete were used to lay 41.21 miles of monolithic underground irrigation pipes every quarter mile across length of farm.



...ing rough spots on cement pipe. Trencher is in upper ...of photo, boom truck with dual wheels in center, and ...ming "boats" and pipe in foreground.

Cement irrigation risers were placed in irrigation system every 47 feet. Water control valve was then placed on top of risers.

After completion, irrigation risers were covered with earth to within two inches of the surface. Company-built canal supplies risers 7,000 gallons per minute.

Company-built cement-lined canal runs entire 16,500 foot length of farm, bisecting it into two equal halves. Canal has five-foot bottom and is 20 feet across top.

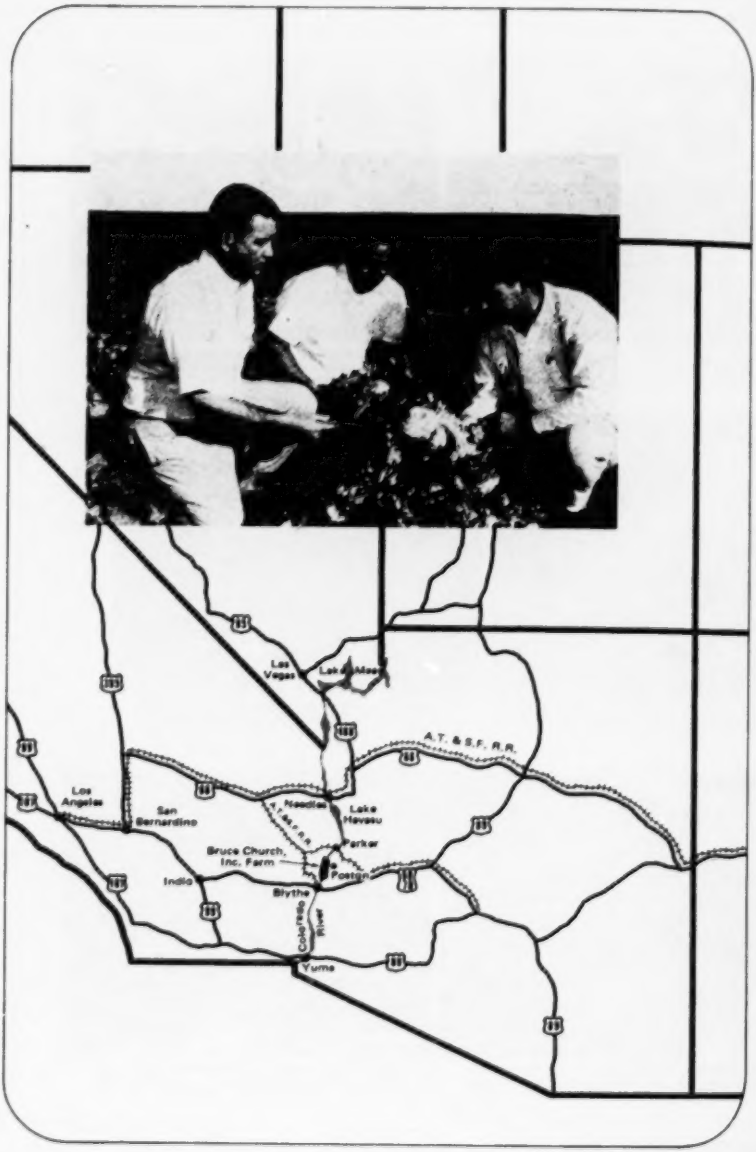

Las Vegas
Lake Mead
A.T. & S.F. R.R.
Los Angeles
San Bernardino
Needles
Lake Havasu
Parker
Bruce Church, Inc. Farm
Poston
India
Blythe
Colorado River
Yuma

EXHIBIT B

PRODUCE GROWN IN ARIZONA BUT PACKED AND SHIPPED FROM BLYTHE, CALIF.

Name of Shipper	*Watermelons*	*Honeydews*	*Cantaloupes*	
1966-67:				
Eaton Farms, S. L.	—	.220	80	
Church, Inc., Bruce	—	—	400	
1965-66:				
Noroian Farms, Nish	165	—	—	
Eaton Farms, S. L.	—	165	234	
Church, Inc., Bruce			80	
1964-65:				
Noroian Farms, Nish	320	—	—	
Eaton Farms, S. L.	—	—	200	
Independent	—	—	90	
1963-64:				
Noroian Farms	180	—	—	
Eaton Farms, S. L.	—	300	300	
Garin Co., The	—	110	—	
Martin Produce Co.	—	34	170	
1962-63:				
Eaton Farms, S. L.	—	220	280	
1961-62:				
Eaton Farms, S. L.	—	—	180	
1960-61: Nothing				
1959-60: Nothing				
1958-59: Nothing				
1957-58: Nothing				
1956-57: Nothing				
1955-56: Nothing				
1954-55: Nothing				
1953-54: Nothing				
TOTAL	665	1049	2014	
GRAND TOTAL				3648
				80
				3728

EXHIBIT C

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Colorado River Agency
Parker, Arizona 85344

September 27, 1968

TO WHOM IT MAY CONCERN:

The crop reports for the Colorado River Indian Irrigation Project show that, in the following listed years, cantaloupe and/or honeydew melons were produced on the project.

Year	*Acres*
1948	234
1949	162
1950	360
1951	320
1952	—
1953	—
1954	500
1955	600
1956	460
1957	526
1958	1940
1959	1527
1960	1049
1961	No Report
1962	1386
1963	1610
1964	2021
1965	1192
1966	1580
1967	1979

Our records do not document the individual grower, the extent of his crop or where it was processed.

We have accumulated the following history by interview in an attempt to show where processing was accomplished.

In the early part of the melon history Mr. Chet Johns of the Pacific Farms did grow a melon crop and attempted to process the crop in both Blythe and Yuma. Part of the Pacific Farms' crop was processed in Blythe, California at the Wilco Packing shed.

The Wilco Produce Company of Blythe, California grew melon crops from about 1949 through 1962 and processed part of their crop grown on the project in their Blythe facility.

Mr. Martin Bedorian of Suzy Bel Farms of Blythe, California processed his crop in Blythe, California at the Wilco Packing facility.

Mr. Sax Eaton of the S. L. Eaton Farms has grown a melon crop since about 1962, and also has processed his crop in Blythe, California.

The Bruce Church Company grew their first crop in 1966 and since that time have grown yearly crops and processed them in Blythe, California.

It appears that some melon crop grown on the project has been processed in Blythe, California every year since 1948. A more detail history could be completed by researching the old files of the Wilco Produce Company of Blythe, California.

Sincerely yours,

Tim C. Dye

Land Operations Officer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRUCE CHURCH, INC., a California corporation, Plaintiff, vs. L. J. PIKE, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, et al., Defendants.	NO. CIV. 6702 - Phx. PRELIMINARY INJUNCTION

This cause coming on to be heard upon the application of Bruce Church, Inc., plaintiff in the above entitled action, for a preliminary injunction, and upon plaintiff's verified complaint, no answer having been filed by defendant, and upon the evidence introduced by both plaintiff and defendant, and after hearing counsel for the respective parties, and it appearing to the Court:

1. That the Court has jurisdiction over this controversy.

2. That plaintiff is engaged in the business of growing, packing and shipping fresh fruits and vegetables, including cantaloupes, both in the States of Arizona and California and that such crops grown by plaintiff and other shippers are sold in interstate commerce.

3. That defendant L. J. Pike, purporting to act under authority of law and pursuant to certain sections of Title 3, Chapter 3, Article 4, Arizona Revised Statutes, has threatened and does threaten to interfere with, impede, restrain, prevent and prohibit plaintiff from loading and transporting, loose and in bulk, a crop of cantaloupes, grown by plaintiff at Parker, Arizona,

across the state line of Arizona into the State of California for processing, packing and shipping into interstate and foreign commerce; and

4. That said crop of cantaloupes will mature and be ready for harvest, processing, packing and shipping within the next week or ten days, and for a period of three to five weeks thereafter; that plaintiff does not have and there is not available to plaintiff at Parker, Arizona, adequate facilities for processing, packing and shipping said cantaloupes; that plaintiff does have adequate processing, packing and shipping facilities for said cantaloupes in Blythe, California, and that if said crop of cantaloupes is not promptly processed, packed and shipped by plaintiff by and through the use of its facilities at Blythe, California, such crop will spoil and plaintiff will sustain an unrecoverable financial loss of approximately $300,000.00; and

5. That if plaintiff is not permitted to process, pack and ship its crop of cantaloupes, as aforesaid, at its facilities in Blythe, California, it will sustain a further financial loss and damage as the result of loss of customers and markets and a competitive position in the produce industry, the amount of such damage being impossible to ascertain with any degree of certainty.

6. That the containers in which plaintiff's cantaloupes will be packed and shipped are in all respects identical to those required under the laws of the State of Arizona, and that the laws of the State of California with respect to inspection, packing, grading, marking and shipping of cantaloupes are in all material respects substantially similar to applicable laws of the State of Arizona; and

7. That for a number of years prior hereto, certain growers and shippers, including plaintiff, have transported cantaloupes, loose and in bulk, across the state line of Arizona for processing, packing and shipping and that such practice has been with the knowledge and approval and without interference of Defendant Pike or the State of Arizona; and

8. That there is a substantial question of whether any interpretation, application or enforcement of the Arizona Fruit and Vegetable Standardization Laws in the manner proposed and threatened by defendant, as alleged in plaintiff's complaint, would constitute an unreasonable and undue burden upon and obstruction of interstate commerce in violation of the Commerce Clause, Article 1, Section 8, of the Constitution of the United States and, therefore in violation of plaintiff's rights; and

9. That neither defendant Pike nor the State of Arizona will sustain material damage or injury if the preliminary injunction is granted.

For the reasons hereinabove set forth, and because of the irreparable nature of plaintiff's injury, and, further, because plaintiff has no adequate remedy at law, it appears to the Court that a preliminary injunction should issue as prayed for in plaintiff's complaint.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's application for preliminary injunction be and the same hereby is granted, and that pending trial of this matter defendant L. J. Pike, his deputies, agents, servants, employees, and attorneys, and all persons in active concert and participation with them be and are hereby restrained from in any manner, either directly or indirectly threatening, ordering, attempting or acting (a) to hinder, interfere with, impede, restrain, prohibit or prevent the plaintiff from harvesting its crops of cantaloupes, grown by plaintiff in the State of Arizona, in, around or about Parker, Arizona, and from placing the same loose in trailers and transporting them across the state line of Arizona into the State of California for processing and packing in standard containers like those in use in Arizona, preparatory to shipment and shipment to buyers or consignees in the various states of the nation and foreign commerce; (b) to seize and take possession of any crops so harvested, loaded or transported; (c) to take any action to forfeit bonds or to deny or revoke licenses of

plaintiff because of such harvesting, loading or transportation of such crops; or (d) to take any other action penalizing, injuring or damaging plaintiff on account or because of such harvesting, loading or transporting.

IT IS FURTHER ORDERED that said preliminary injunction shall remain in full force and effect until final hearing in this case and further order of this Court.

DATED this 7th day of June, 1968.

s/ Charles M. Merrill
Judge, United States Court of
Appeals For The Ninth Circuit

s/ Walter E. Craig
United States District Judge

s/ C. A. Muecke
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRUCE CHURCH, INC., a California corporation,

Plaintiff,

vs.

L. J. PIKE, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, et al.,

Defendants.

No. Civ-6702 Phx.

OPINION AND ORDER

CRAIG, D. J.

The within action was instituted by plaintiff, Bruce Church, Inc., a California corporation, against L. J. Pike, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, and others.

Plaintiff is engaged in extensive agricultural operations, including the growing, harvesting, packaging and shipping of agricultural products in California and Arizona.

In 1964 plaintiff entered into a lease with the Secretary of the Interior, the Commissioner of Indian Affairs, the Colorado River Indian Agency and the Colorado Indian Tribes under the terms of which plaintiff undertook, at substantial expense, to develop 6,400 acres of unimproved land in the Colorado River Indian Reservation near Parker, Arizona. Plaintiff does not have packing facilities at Parker and at least in the foreseeable future apparently had no intention of developing packing facilities at that location for the reason that it had adequate facilities at Blythe, California, some 31 miles distant, which could be economically used in sorting, grading, packing and shipping the produce

grown and harvested on the Arizona side of the river. It was plaintiff's intention and practice to harvest its melons grown in the Parker area, to load them in trailers and to haul the bulk load to plaintiff's packing facilities at Blythe, where the melons were sorted, inspected, packed and shipped.

Title 3, Chapter 3, Article 4, Arizona Revised Statutes constitutes the Arizona Fruit and Vegetable Standardization Act (§§ 3-481 et seq., A.R.S.) § 3-843 of the Act provides for the creation of the office of Supervisor of Inspection, charged with the responsibility of enforcing the provisions of the Act. Defendant Pike currently holds that position. The Arizona Act includes certain requirements with respect to containers, labeling, inspecting, grading, licensing, etc., and provides certain sanctions for failure to comply with the provisions of the Act or the Rules and Regulations promulgated thereunder.

In March, 1968, defendant Pike, acting in his official capacity and under his interpretation of the Fruit and Vegetable Standardization Act, *supra,* notified plaintiff that no future transportation of bulk shipments of cantaloupe harvested by plaintiff would be allowed out of the State of Arizona to the plaintiff's packing facilities at Blythe, California.

Under the provisions of Article 1, § 8 of the United States Constitution (Commerce Clause) and Article 6 of the United States Constitution (Supremacy Clause) and pursuant to the provisions of Title 28 U.S.C. § 2201, plaintiff instituted this action questioning the constitutionality of the Arizona Fruit and Vegetable Standardization Act, *supra,* insofar as its enforcement by defendant Pike under his interpretation of the Act constitutes an unreasonable and unlawful burden upon interstate commerce. This Court has jurisdiction by virtue of Title 28 U.S.C. § 1331 and Title 28 U.S.C. § 1332.

The complaint questions the constitutionality of a state statute. Consequently, a Three Judge Court was convened pursuant to Title 28 U.S.C. §§ 2281, 2284. In order to conserve the crop

then being harvested, a temporary restraining order was issued by this Court and continued by stipulation until a hearing on the merits on June 7, 1968.

A temporary injunction issued from this Court pending ultimate determination of the issues, which injunction restrained the defendant Pike from further acts of deterrence with respect to plaintiff's bulk shipments of melons from its farms in Arizona to its packing plant in California.

The parties have entered into an agreed statement of facts as to which this Court has taken notice. The parties have submitted memoranda in support of the respective positions of the parties.

We are first confronted with the question as to whether the abstention doctrine should be invoked in this case. To paraphrase the question propounded by the United States Supreme Court in *Burford v. Sun Oil Co.*, 319 U.S. 315, 318, 63 S.Ct. 1098, 1099, and quoted in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 71 S.Ct 762:

> "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"

Many cases involving Three Judge Courts with jurisdiction predicated upon both the presence of a federal question and diversity of citizenship have invoked the abstention doctrine. *See Harrison v. NAACP*, 360 U.S. 167, 79 S.Ct. 1025; *Alabama Public Service Commission v. Southern Railway Co., supra.* The issue here is whether this case presents a situation in which this Court should exercise the power of abstention. Apparently there is no clear cut rule existing to guide a Court in making this determination. Certain criteria, however, appear in existing decisions that indicate when it is appropriate to exercise the power of abstention. In *Harrison, supra,* the Court stated:

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with

proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should at all times actuate the federal courts,' (authorities cited) as their 'contribution * * * in furthering the harmonious relation between state and federal authority * * *.' (authorities cited) In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (authorities cited) This principle does not, of course, involve the adbication [sic] of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. (authorities cited)"

A recent discussion of the abstention doctrine in *Zwickler v. Koota,* 88 S.Ct. 391, 395, states that the power should be exercised "only in narrowly limited 'special circumstances'." Among the "special circumstances" noted in *Zwickler* are (1) the susceptibility of a state statute to a construction by the state courts that would avoid or modify constitutional questions before the federal court, and (2) the possibility that adjudication would disrupt state administrative processes. In *Zwickler* neither of these "circumstances" was present, and the court held, therefore, that it was error for the district court to apply the doctrine. The court found application of the doctrine inappropriate where plaintiff attacked a state statute on its face as being repugnant to the First Amendment. We do not believe the instant case an appropriate one to invoke the abstention doctrine.

The Arizona Fruit and Vegetable S ndardization Act has never been constitutionally construed by the Arizona courts, nor do we believe it necessary to the disposition of this case to determine the constitutionality of that Act. Moreover, a present adjudication

of this case through constitutional interpretation might well disrupt the legitimate interests of the State of Arizona.

A reading of the Act reveals no clear basis nor authority for the issuance of the order by the defendant, Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, which order has been attacked by the plaintiff in this case. The constitutionality of the Act, then, is not in question. What is in question is the construction placed upon that Act by the Superintendent and the constitutionality of the order issued by him pursuant to his construction.

A review of the agreed statement of facts and the Act in question indicates that the order complained of constitutes an unlawful burden upon interstate commerce. *See Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1, 49 S.Ct. 1; *Johnson v. Haydel,* 278 U.S. 16, 49 S.Ct. 6; *Schafer v. Farmers Grain Co.,* 268 U.S. 189, 45 S.Ct. 481; *Lemke v. Farmers Grain Co.,* 258 U.S. 50, 42 S.Ct. 244. If the application of the Arizona Fruit and Vegetable Standardization Act, as interpreted by the Supervisor of Inspection, could be construed to be a valid interpretation and application of the statute, then the statute so interpreted and applied is unconstitutional.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the injunction heretofore issued restraining the defendant, L. J. Pike, his deputies, agents, servants, employees and attorneys and all persons in active concert and participation with them from in any manner, either directly or indirectly, threatening, ordering, attempting or acting (a) to hinder, interfere with, impede, restrain, prohibit or prevent plaintiff from harvesting its crops of cantaloupe grown by plaintiff in the State of Arizona, in the vicinity of Parker, Arizona, and from transporting said cantaloupe in bulk into the State of California; (b) to seize and take possession of any crops harvested, loaded or transported; (c) to take any action to forfeit bonds, or to deny or revoke licenses of the plaintiff because of harvesting, loading or transporting such crops; or (d) to take any other

action penalizing, injuring or damaging plaintiff on account of or because of such harvesting, loading or transporting in interstate commerce shall be permanent.

DATED this 4th day of March, 1969.

CHARLES M. MERRILL
Charles M. Merrill, U.S. Circuit Judge

WALTER E. CRAIG
Walter E. Craig, U.S. District Judge

C. A. MUECKE
C. A. Muecke, U.S. District Judge

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Supreme Court of the United States

No. 301 ---- , *October Term, 19* 69

Loren J. Pike, etc.,

Appellant,

v.

Bruce Church, Inc.

APPEAL from the United States District Court for the District of Arizona.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar. This case is set for oral argument with No. 185 in which jurisdiction was noted today.

October 13, 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No._____

LOREN J. PIKE, as Supervisor of Inspection,
Arizona Fruit and Vegetable Standardization Service,
Appellant,

versus

BRUCE CHURCH, INC., a California corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three judge district court has not yet been officially reported. A copy of that opinion is set forth in full in the Appendix.

JURISDICTION

This is an appeal from the judgment of a three judge district court enjoining the appellant from enforcing an order issued by him pursuant to the provisions of the Arizona Fruit and Vegetable Standardization Act. The court originally entered an

opinion and judgment on January 29, 1969. Following a Motion for Rehearing and/or Clarification, the court withdrew its first opinion, and issued a second opinion and judgment dated March 4, 1969, and filed on March 10, 1969. A Motion for Rehearing was filed on April 1, 1969, and denied by order entered May 1, 1969. The Notice of Appeal was filed May 2, 1969. This appeal is taken from the judgment contained in the lower court's second opinion and the denial of the Motion for Rehearing pertaining thereto.

This Court has jurisdiction by virtue of 28 U.S.C. § 1253.

STATUTE INVOLVED

Arizona's Fruit and Vegetable Standardization Act, Arizona Revised Statutes, Title 3, Chapter 3, Article 4, prescribes minimum standards pertaining to quality and packing for Arizona fruits and vegetables. Specifically involved in this case are the following sections of that Act:

A.R.S. § 3-482.

Scope of article; containers

A. All fresh fruits and vegetables when being packed, after packing, when delivered for shipment, loaded, shipped, being transported, offered for sale or sold in this state, for which grades, standards and standard containers are established in this article, shall come within the meaning of this article.

B. All lots of fruits and vegetables packed for sale, offered for sale, transported for sale or sold in this state shall be packed in new or clean containers.

A.R.S. § 3-483.

Supervisor of inspection; appointment; oath; bond; deputies and clerks; qualifications

A. There is created the office of supervisor of inspection, hereinafter referred to as the supervisor.

B. The supervisor, who shall enforce this article, shall be appointed by and shall hold office at the pleasure of the dean

of agriculture of the university of Arizona, who shall also supervise and direct the supervisor.

C. The supervisor may employ and discharge deputies and clerks as his needs may require. No person related to the supervisor by blood or marriage shall be appointed deputy or clerk.

D. The supervisor shall take and file the oath of office, and shall give a surety bond to the state for the faithful performance of his duties.

E. The supervisor and deputies shall be experienced in the inspection of fruits and vegetables and in commercial packing practices, and each shall hold, at the time of appointment, a federal fruit and vegetable inspector's license.

A.R.S. § 3-503.

Cantaloupes; definitions; serious damage; standard packs; crate markings; irregular sized container; exception

A. Cantaloupes shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting, or other causes. Damage to any one cantaloupe is not serious unless it affects the edible portion or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof. Not more than ten per cent, by count, of the cantaloupes in any one container may be below the foregoing requirements, but not to exceed one-half of this tolerance shall be allowed for any one cause. Cantaloupes packed in the standard containers shall be fairly uniform in size. All cantaloupes in each container shall be of one variety or similar varietal characteristics.

B. "Mature", in the case of cantaloupes, means that the appearance of the outside indicates maturity and the arils which surround the seed during the development of maturity have been absorbed and, in addition, that the juice of the edible portion shall contain not less than eight per cent soluble solids as determined by the standard hand refractometer.

C. All containers of cantaloupes shall have appearing thereon, in plain sight and in plain letters on one outside end, the name of the person who first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready location of such packer. All cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the supervisor except as follows:

1. Cantaloupes to be used for charitable purposes or unemployment relief, or by the United States government or its agencies.

2. Any retail sales directly to a consumer.

D. As used in this section, "closed" or "lidded", as applied to containers of cantaloupes, mean:

1. In the case of fibreboard containers that the opening is completely covered, except for necessary ventilation openings, with material of similar quality and strength to the adjoining portion of the container.

2. In the case of nailed wooden, wirebound, or other containers, that forty per cent or more of the opening is covered with material similar to that used in the construction of the sides and bottom of such containers, securely attached to the top.

E. In addition to the markings required by subsections B, C and D, § 3-499, each container of cantaloupes shall be conspicuously marked in letters not less than one half of one inch in height, stating the exact number of melons packed therein. Added Laws 1965, Ch. 85, § 5.

QUESTIONS PRESENTED

Section 3-503, Arizona Revised Statutes, provides, *inter alia*, that with certain exceptions all cantaloupes grown in the State of Arizona "shall be packed in regular compact arrangement in closed standard containers approved by the supervisor. . . ." Pursuant to this statute, the appellant, who is the "supervisor" referred to by the statute, entered an order prohibiting the appellee from shipping its cantaloupes grown at Parker, Arizona,

out of the state other than in closed standard containers approved by him. The lower court has held that this order was without clear statutory basis and that it constitutes an undue burden on interstate commerce. The questions presented are:

(1) Whether, under this Court's decisions in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934) the strictures of the commerce clause are even relevant, since the regulation occurs and is terminated prior to the time that the regulated goods move in interstate commerce;

(2) Whether the Arizona Fruit and Vegetable Standardization Act, as interpreted and applied by the appellant in this case, is unconstitutional as an undue burden on interstate commerce; and

(3) Whether the lower court properly held that there was no statutory basis for the appellant's order.

STATEMENT OF THE CASE

The growing of fruits and vegetables, and the marketing of these fruits and vegetables in interstate and foreign commerce, is one of the leading industries of the State of Arizona. The most important legislation governing this Arizona industry is the Fruit and Vegetable Standardization Act, whose enforcement provisions—as interpreted by the appellant, the administrative officer charged with the enforcement of the Act—the district court has held unconstitutional, at least as applied to cantaloupes.

The purpose of the Fruit and Vegetable Standardization Act is to preserve and enhance the reputation of Arizona fruits and vegetables in interstate and foreign commerce. The Act accomplishes this objective by requiring minimum standards of quality and pack for all produce subject to the Act. Different types of produce are subject to different requirements.

The prototype problem with which the Act was intended to deal is set forth in the Stipulation of Facts entered into between

the parties (hereinafter referred to as "Stipulation"). The long-run reputation which a grower of fruits and vegetables acquires is of utmost importance to the successful marketing of his fruits and vegetables from year to year. Prior to the adoption of the Fruit and Vegetable Standardization Act, growers in Arizona often found that such a reputation was impossible to achieve because of sub-standard produce shipped by other producers within the State. These growers found that poor quality and slip-shod packing practices employed by a few shippers had the effect of demeaning generally the reputation of "Arizona" fruits and vegetables. Stipulation, 3/2-26.

It was to remedy this dilemma and to enhance the reputation of Arizona fruits and vegetables in interstate and foreign commerce that the Arizona Fruit and Vegetable Standardization Act was enacted. *Ibid.*

The Act accomplishes its purposes by prescribing minimum standards and enforcement procedures with regard to two separate objectives. They are: (1) intrinsic soundness and quality of the produce itself, and (2) uniformity and compactness of packing. The parties have stipulated that "the Act has been successful in achieving its purpose." Stipulation 3/26.

As to both of these objectives, the section of the Act pertaining to cantaloupes — A.R.S. Section 3-503 — is illustrative. With regard to quality, subsections A and B of that section provide as follows:

> A. Cantaloupes shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting, or other causes. Damage to any one cantaloupe is not serious unless it affects the edible portion or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof. Not more than ten per cent, by count, of the cantaloupes in any one container may be below the foregoing requirements, but

not to exceed one-half of this tolerance shall be allowed for any one cause. Cantaloupes packed in the standard containers shall be fairly uniform in size. All cantaloupes in each container shall be of one variety or of similar varietal characteristics.

B. "Mature", in the case of cantaloupes, means the appearance of the outside indicates maturity and the arils which surround the seed during the development of maturity have been absorbed and, in addition, that the juice of the edible portion shall contain not less than eight per cent soluble solids as determined by the standard hand refractometer.

With regard to packing standards, A.R.S. Section 3-503 C provides as follows:

C. All containers of cantaloupes shall have appearing thereon, in plain sight and in plain letters on one outside end, the name of the person who first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready locati of such packer. All cantaloupes shall be packed in regulai ompact arrangement in closed standard containers approved by the supervisor except as follows:

1. Cantaloupes to be used for charitable purposes or unemployment relief, or by the United States government or its agencies.

2. Any retail sales directly to a consumer.

Thus, packing standards are left largely to the discretion of the supervisor, the appellant in this case. The statute is explicit, however, in its command that cantaloupes must be packed in "closed standard containers approved by the supervisor." This mandate that all cantaloupes must be packed in closed standard containers was part of a 1965 amendment. Prior to 1965, subsection G of A.R.S. § 3-503 provided that "No containers are established for unpacked or loose cantaloupes."

All enforcement of the Act is vested in the appellant, as Supervisor of Inspection. A.R.S. § 3-483.

Even after the 1965 amendment, the appellant has allowed small amounts of cantaloupes to be shipped out of the State in

bulk, and therefore not in "closed standard containers approved by the supervisor." The appellee itself was permitted to ship in bulk 400 acres of cantaloupes harvested from its Parker ranch in 1967. Stipulation, Exhibit B. Aside from this shipment, however, all of the shipments in violation of the 1965 amendment to the Act were by small shippers and in comparatively insignificant amounts. *Ibid.* As to the vast majority of cantaloupes grown in the State, the statutory mandate that cantaloupes were to be packed in closed standard containers approved by the supervisor was enforced.

The matter of enforcement of the Act pertaining to cantaloupes came to a head in 1968. Following a controversy with the appellant concerning proposed enforcement of the Act, the appellee procured the introduction of a bill in the Arizona State Legislature which would have permitted bulk shipment of vegetables and melons out of the State of Arizona to a destination not more than 25 miles beyond the state line. This bill—H.B. 170, State of Arizona, 28th Legislature, Second Regular Session—would, of course, have repealed both the requirement that cantaloupes must be packed in closed standard containers approved by the supervisor, and also the requirement that the supervisor inspect for quality defects. H.B. 170 passed the Arizona House of Representatives, but died in Committee in the Senate.

Following the defeat of the appellee's bill, the appellant sent letters to appellee and all other interested shippers informing them that he would no longer permit bulk shipments of cantaloupes out of the State.[1] This letter, dated March 22, 1968, is the "order" to which the lower court's opinion refers. Stipulation 16/30-32.

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[1] At his deposition, Mr. Pike testified that following the defeat of H.B. 170 he "could see no other alternative for me only to enforce the law." Pike Deposition, p. 56, lines 12 and 13. The deposition of the appellant, Mr. L. J. Pike, and the deposition of Mr. David Gipe, General Manager of the Arizona operations of the appellee, were incorporated into and made part of the Stipulation of Facts. Stipulation, 24/25-25/3.

The appellee reacted to the appellant's letter by preparing and filing this action, asking for declaratory judgment that the Arizona Fruit and Vegetable Standardization Act as interpreted and applied by the appellant was unconstitutional. The complaint also sought injunctive relief against enforcement of the Act as ordered by appellant. The complaint alleged that the appellant's order constituted an undue burden on interstate commerce, and that it was inconsistent with the Agricultural Adjustment Act, 48 Stat. 31 et seq., 7 U.S.C. § 601 et seq. and other federal law.

The appellee is a multi-million dollar farming corporation, one of the largest and most successful fruit and vegetable growers in Arizona and California. At its Parker operation alone, the appellee has spent more than three million dollars in capital improvements in preparing some 6,400 acres of land for farming under lease from the Colorado River Indian Tribes. Stipulation 6/24-32; 7/27-30. In all, the appellee farms between 25,000 and 30, 000 acres. *Id.* at 6/5-6.

The parties stipulated at the oral argument before the district court that cantaloupes can be inspected for the defects proscribed by the statute only at the packing stage. See Transcript of Oral Argument before district court, pages 70-71. It is, of course, impossible to inspect for uniformity and compactness of pack unless the inspector can inspect the packing process and the containers in their final packed form; hence the statutory requirement that cantaloupes be packed in "closed standard containers approved by the supervisor." Similarly, inspection for quality defects at any stage of the preparation of cantaloupes for market, other than the packing stage, would be inordinately disruptive to the shipper's operations and impossible for the inspector to accomplish. Inspection of cantaloupes to determine compliance with standardization laws simply is not carried out in this State or any other State except at the time that the cantaloupes are being sorted and packed. And the sorting and packing must be accomplished at the packing shed.

Therefore, if the Arizona Supervisor of Inspection is to enforce the standards of the Fruit and Vegetable Standardization Act relative to cantaloupes at all, he must do so by inspection at the time the cantaloupes are packed within Arizona. If they are packed outside the State of Arizona they cannot be inspected by the Supervisor because they are outside his jurisdiction.

Under present technology, it is not commercially feasible to pack cantaloupes except in a packing shed. Gipe Deposition 10/8-13. The appellee does not have a packing shed at its Parker Ranch. Stipulation 9/15-18. At the time this suit was filed, it had leased a packing shed in Blythe, California, some thirty miles from Parker. *Id.* at 12/18-20. The lease expired in November of 1968. *Id.* at 22/28.

The problem from the appellee's standpoint is thus strictly an economic one: under the Act, appellee cannot ship its cantaloupes unless they have been inspected; they cannot be inspected by the appellant unless they are packed in Arizona; and they cannot be packed except in a packing shed. However, this Court has made it very clear in many cases that the mere fact that State regulation results in greater expense to a profit-making corporation is not sufficient to invalidate the State regulation on commerce clause grounds.[2]

Moreover, in the instant case the economic impact to the appellee is minimal. The leased facilities at Blythe will be inadequate for the appellee's anticipated acreage at Parker in any event, and appellee plans to build its own shed either in Arizona or California. The appellee has considered that matter but has not yet decided whether to build in Arizona or California. Gipe Deposition 54/9-55/5. The cost of a shed sufficient to serve appellee's anticipated acreage is approximately $200,000, (*Id.* at 54/10) which is less than one third the value of one cantaloupe crop for one year. Stipulation, 8/22-23.

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[2] *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945).

A three judge federal district court was convened to determine the issues in the case, and on June 7, 1968 that court (1) entered a preliminary injunction preventing the appellant from enforcing his order as to the appellee's 1968 cantaloupe crop; (2) instructed the parties to enter into a stipulation of facts; and (3) set the matter down for argument on the legal issues.

Following the preparation and filing of a stipulation of facts and the parties' briefs, the case was argued on November 15, 1968.

On January 29, 1969, the court filed an opinion ruling in appellee's favor, but the ground of the ruling was unclear. The appellant filed a "Motion for Rehearing and/or Clarification," and on March 10, 1969 the court filed a new decision granting the judgment from which this appeal is taken. The court in its second opinion held for the respondent on two independent grounds: (1) the court said that it could find "no clear basis nor authority" in the statute for the appellee's order that cantaloupes not be shipped outside the State in bulk, and (2) the court held that, in any event, the order constituted an unconstitutional burden on interstate commerce.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Any time that any aspect of an important state statute is declared unconstitutional by a federal court, the issue can hardly be said to be anything but substantial. Similarly, whenever a three judge federal district court interprets an important state statute in such a way as to effectively render it unenforceable, and the only appeal from that interpretation is to this Court, the issue is substantial. In the instant case, the lower court has done both.

The substantiality of the federal issue is compounded in the instant case by the fact that the lower court's holding has cast a shadow not only over the enforcement procedures of Arizona's Standardization Act, but also over those of all other states which have adopted standardization laws in an attempt to enhance the long-run reputation of their states' produce. The lower court's

handling of the constitutional aspect of its decision is cryptic in the extreme, but at the very minimum, the district court has necessarily held that where enforcement of a state's agricultural standardization laws would be impossible without requiring possible expenditures of money by certain farming corporations, enforcement of standardization laws under such circumstances is unconstitutional. Thus, the potential impact of the decision extends far beyond the enforceability of Arizona's standardization laws pertaining to cantaloupes.[3]

The district court's assertion that it could find no clear statutory basis for the appellant's action is completely without foundation. It would be difficult to draft a statute in any more clear terms than those which were used by the Arizona Legislature: "All cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the supervisor. . . ."

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[3] Virtually every important agricultural state in the nation has a standardization act of some kind.

Arizona's Standardization Act was patterned after the California Act and the provisions of the two acts are still similar, though their standards differ in various respects.

For examples of standardization acts of other states, see the following:

California—West's Annotated California Codes, Agricultural Code, Division 17.
Colorado—Colorado Revised Statutes (1963), Chapter 7.
Florida—Florida Statutes Annotated (1962), Title 33.
Idaho—Idaho Code (1968), Title 22.
Illinois—Smith-Hurd Illinois Annotated Statutes (1966), Chapter 5.
Indiana—Burns Indiana Statutes (1964), Title 15.
Iowa—Iowa Code (1949), Title 10.
Mississippi—Mississippi Code (1942), Title 19.
Montana—Revised Codes of Montana (1947), Title 3.
Nevada—Nevada Revised Statutes (1963), Title 51.
New Mexico—New Mexico Statutes (1953), Chapter 45.
Ohio—Page's Ohio Revised Code (1953), Title 9.
Oregon—Oregon Revised Statutes (1953), Title 49.
Tennessee—Tennessee Code (1954), Title 43.
Utah—Utah Code (1953), Title 4 and Title 5.
Washington—Revised Code of Washington (1962), Title 15.
Wyoming—Wyoming Statutes (1957), Title 11.

Under certain circumstances, this Court has observed that it is "hesitant to overrule decisions by Federal courts skilled in the law of particular states [concerning the meaning of state law] unless their conclusions are shown to be unreasonable." *Propper v. Clark,* 337 U.S. 472, 486-487 (1949). In the instant case, however, the interpretation of the lower court is not the product of skill in the law of the State of Arizona; the court's view of the statute is refuted by the language of the statute itself.[4]

In the instant case, the governing rule of statutory interpretation is that which prescribes that "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agencies charged with its administration." *Udall v. Tallman,* 380 U.S. 1, 16 (1965). *Udall v. Tallman* arose in the context of a federal statute, but the principle is equally applicable to interpretation of state statutes, particularly where upsetting the administrative officer's interpretation is potentially as disruptive as in the instant case.

If the lower court had bottomed its holding solely on the ground that it could find no statutory basis for the appellant's order, then there might be some question to the substantiality of the federal issue. In such event, the appellant would have an alterna-

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[4] Had the court given any indication at the argument stage that it was considering basing its judgment on a statutory interpretation ground, or had the appellee pressed this point either in its briefs or at the oral argument, the appellant might have requested the lower court to abstain in order to allow opportunity for the state courts to pass on this issue. The abstention issue was neither briefed nor argued for the obvious reason that at the argument stage no one thought that interpretation of the statute was at issue. The lower court itself obviously questioned its procedure in holding that there was no statutory basis for appellant's order, since it devoted most of its opinion to the question of abstention. At this stage of the proceedings, we do not feel that abstention should now be an issue. The district court has ruled on the constitutional issue and its ruling would obviously be the same even after a state court declared that the statute means what it says. We therefore feel that this Court should proceed to a review of the lower court's determination on the constitutional issue.

tive remedy before the Arizona State Legislature.[5] The lower court went further, however, and clearly held, as an independent ground for its judgment, that the appellant's order is unconstitutional. Therefore, even if the Legislature were now to amend the statute, the holding as to constitutionality would remain. And unless that holding is reviewed by this Court within the time permitted by this Court's rules, it will become *res judicata,* and might preclude any future review by this or any other court in a suit involving this appellant testing the constitutionality of Arizona law which prevented the appellee from shipping its cantaloupes outside the State of Arizona without first being inspected for quality and packing standards.

Finally, because this case is one of those which, by statute, must be determined by a three judge court, unless the lower court's holding is reviewed by this Court, there will be no appellate review at all. At the very least, the issues raised by the lower court's judgment are too important to be both the first and the last word on the matter.

REASONS WHY PROBABLE JURISDICTION SHOULD BE NOTED

The holding of the lower court that the Act as interpreted and enforced in this case is unconstitutional is out of harmony with this Court's decisions in *Cooley v. Board of Port Wardens,* 12 How. 299 (1851); *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.,* ____ U.S. ____, 89 S.Ct. 323 (1968), and others It is squarely inconsistent with *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934) on the issue of whether in the present context a regulation of the packing of fruits and

[5] It is doubtful, however, that the intent of the Arizona legislature could have been made any more clear, in light of the plain language of its 1965 amendment, and its rejection of H.B. 170, proposed by the appellee in 1968.

vegetables involves a regulation of interstate commerce and with *Sligh v. Kirkwood,* 237 U.S. 52 (1915), on the burden on commerce issue. Because these latter three cases are squarely on point, a brief discussion of their facts and holdings is warranted. None of them was even mentioned by the lower court.

The commerce clause is not applicable to the facts of this case under this Court's decision in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934).

The *McLean* case upheld the constitutionality of a tax imposed by the State of Mississippi upon a cotton warehouse and compress business located within that State. According to stipulated facts, cotton was purchased within Mississippi for resale or to fulfill contracts for sale outside of Mississippi. After the cotton was purchased and ginned, it was transported to the appellant's warehouse for storage, whereupon negotiable warehouse receipts were issued to the owners of the cotton.

The sequence of events occurring after the cotton was stored in the warehouse is of great significance for purposes of the present issue. After the holders of the warehouse receipts had given orders to the warehouse company to ship the cotton, the cotton was compressed. The compression process was a process which occurred only after shipping orders had been received, the purpose of compression being to prepare the cotton for shipment. All except a negligible part of the cotton was shipped to points outside the state. In the language of the Court:

> Upon shipping orders given by the holders of the warehouse receipts, appellant compresses the cotton into bales of standard weight and size, suitable for shipment, and delivers them to the rail carrier for interstate transportation. 291 U.S. at 20.

The appellants argued that the tax upon the business both of warehousing and of compressing the cotton was a forbidden burden upon interstate commerce. In rejecting that contention, this Court held that of the overall continuum of events which

eventually culminated in interstate sale, the compression and warehousing stages did not involve interstate commerce so as to bring into play the question of the constitutionality of the state regulation. The Court's opinion states as follows:

> It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and, although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin, and so it does not become exempt from local tax until its shipment to points of destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner. Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715; Bacon v. Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615; General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754; Susquehanna Coal Company v. South Amboy, 228 U.S. 665, 669, 33 S.Ct. 712, L.Ed. 1015; State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131, decided November 6, 1933; cf. Arkadelphia Milling Co. v. St. Louis Southwestern R. Co., 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517.
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> A nondiscriminatory tax upon the business of storing and compressing the cotton, which is not itself the subject of a movement in interstate commerce, is not forbidden. *Most articles, before their shipment in interstate commerce, have had work done upon them which adapts them to the needs of commerce and prepares them for safe and convenient transportation, but that fact has never been thought to immunize from local taxation either the articles themselves or those who have manufactured or otherwise prepared them for interstate transportation.* American Manufacturing Co. v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed 1084; Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S. Ct. 42, 66 L. Ed. 166; Oliver

Iron Mining Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929; Hope Natural Gas Co. v. Hall, 274 U.S. 284, 47 S. Ct. 639, 71 L. Ed. 1049; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038. Here the privilege taxed is exercised before interstate commerce begins; hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. See Nashville, Chattanooga & St. Louis Railway Co. v. Wallace, 288 U. S. 249, 53 S.Ct. 345, 77 L. Ed. 730. The case, therefore, stands on a footing different from those in which local regulations of the business of purchasing a commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239; Lemke v. Farmers' Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458.

291 U.S. at 21-22. (Emphasis added)

The same problem dealt with by Mr. Justice Stone in the *McLean* case was also the subject of a unanimous opinion authored for the Court by Mr. Justice Brandeis one month later in *Chassaniol v. City of Greenwood, Miss.*, 291 U.S. 584 (1934), a case involving the same basic fact situation as *McLean*. The *Chassaniol* opinion states as follows:

Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in Federal Compress & Warehouse Co. v. McLean; and the rule there declared must govern here. *Ginning cotton, transporting it to Greenwood, and warehousing, buying, and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate com-*

merce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax.

291 U.S. at 586-587. (Emphasis added)

The *McLean* and *Chassaniol* decisions are squarely on point. The packing of fruits and vegetables, like the compression of cotton, occurs prior to shipment in interstate commerce. As those cases make very clear, "each step prior to the sale and shipment is a transaction local to [the state where the transaction occurs]." *Ibid.* It makes no difference that shipment may occur a short time after packing. In the *McLean* case compression occurred only after shipping orders were given; compression was the step which immediately preceded shipment. And in *Chassaniol* the Court pointed out that "when [the buyer] buys he customarily has in hand and in mind orders or contracts for that particular grade for immediate or future delivery in other states or countries to the extent of about ninety per cent, on the average, of all cotton purchased by him." 291 U.S. at 586. Nevertheless, the Supreme Court unanimously rejected the contention that ". . . all the cotton is in interstate or foreign commerce . . . at least from the moment it is purchased at Greenwood by the buyer." *Ibid.*

Sligh v. Kirkwood, 237 U.S. 52 (1915), upheld the constitutionality of a Florida statute making it unlawful for anyone to sell, offer for sale, ship or deliver for shipment, any citrus fruits which were immature or otherwise unfit for human consumption. In dealing with the issue of the scope of state police powers, the Court quoted from *Eubank v. Richmond,* 226 U.S. 137 (1912), "It [the state police power] extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity." 226 U.S. at 142.

It was contended in the *Sligh* case — as the appellee has contended in this case — that the regulation of fruits which were

destined for sale in states other than the State of Florida was not a legitimate concern of the State of Florida and not properly within its police powers. This Court's opinion refuting that contention states as follows:

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. *The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.*
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> 237 U.S. at 61-62. (Emphasis added)

We submit that the foregoing language from the *Sligh* opinion, and the holding of that case, are completely dispositive of the same issues in the instant case. If Florida, in 1915—in the interest of maintaining the reputation of its citrus industry as a whole—can prevent the shipment of immature citrus fruits in interstate commerce, then Arizona, in 1968, can surely prescribe standards of quality, appearance, packing and marketability for cantaloupes to be shipped in interstate commerce, and can prevent any cantaloupes from leaving this State which do not comply with those standards.

The holding and the rationale of *Sligh v. Kirkwood* are consistent with a long line of this Court's decisions, reaching back to the leading case of *Cooley v. Board of Port Wardens*, 12 How. 299 (1851). The landmark principle laid down by *Cooley* was the following:

Now, the power to regulate commerce, embraces a vast field,

> containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
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> 12 How. at 319.

From a functional standpoint, the issue of uniformity versus diversity requires an inquiry into whether there is any adverse impact upon interstate commerce resulting from the fact that different states may enact different laws pertaining to fruit and vegetable standardization. Unlike the mud guard requirements in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), the weight and width restrictions in *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938), and the train length limitations in *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945), the differences between the instant law and the laws of sister states are not themselves impediments to commerce. In *Bibb*, *Barnwell* and *Southern Pacific*, interstate shippers found themselves obligated, upon entering the state at issue, to go to great expense and trouble solely because of the differences in state laws. Interstate truckers, for example, upon entering the State of Illinois prior to the *Bibb* case, had to install new mud guards. In *Barnwell*, interstate truckers, upon reaching the South Carolina state line, found themselves obligated either to reload their cargo onto other trailers or go around the State of South Carolina. And in *Southern Pacific Company v. Arizona*, interstate railroads had to shorten the size of their passenger and freight trains at El Paso and Los Angeles because of the *differences* between the Arizona law and the laws of its sister states.

The Arizona Fruit and Vegetable Standardization Act, by contrast, has its first and final impact on goods which originate within this State before they ever enter any other state. Once these goods cross a state line, there is no further impediment to their

interstate journey because of any differences in standardization laws.

The instant case is therefore the clearest possible example of a case which falls on the permissible side of the *Cooley* dividing line: There is no adverse impact whatever upon interstate commerce as a result of *differences* between Arizona's standardization laws and the standardization laws of other states. By the time Arizona fruits and vegetables become a part of the flow of interstate commerce, they do so completely free from any regulation under the Act at issue.

The cases on this issue since *Cooley v. Board of Port Wardens,* culminating as recently as last year in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.,* ____ U.S. ____, 89 S.Ct. 323 (1968) have made it very clear that so long as the regulation at issue involves a legitimate exercise of the state police power, and falls within an area of sate competence to regulate, federal courts will be very reluctant to hold the statute unconstitutional on commerce clause grounds. In the instant case, both the legitimacy of the state interest, and the ultimate commerce clause issue, are squarely resolved by this Court's decision in *Sligh v. Kirkwood.*

The only clues to the basis for the lower court's holding that "the order complained of constitutes an unlawful burden upon interstate commerce" can be found in the cases which the court cites in support of this holding: *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); *Johnson v. Haydel,* 278 U.S. 16 (1928); *Shafer v. Farmers Grain Co.,* 268 U.S. 189 (1925); *Lemke v. Farmers Grain Co.,* 258 U.S. 50 (1922).

The opinion is devoid of any discussion of the court's view of the significance of these cases. The court apparently felt, however, that *Lemke* and *Shafer* were pertinent to the issue of whether commerce clause strictures applied to a state regulation imposed at a processing stage prior to the beginning of the interstate journey, and that the *Haydel* cases were relevant to the

burden on commerce issue. Examination of those cases reveals that the court's reliance upon them is misplaced.

Lemke and *Shafer* both struck down regulations imposed upon the purchase of grain stored in elevators for immediate shipment outside of the state without any resale or processing prior to such shipment. Dictum in the *Lemke* case refers to the "time when goods begin their interstate journey by delivery to a carrier or otherwise . . ." (285 U.S. at 55), apparently regarding delivery to an elevator as being tantamount to delivery to a carrier. Those cases were distinguished by *Parker v. Brown,* 317 U.S. 341, 361 (1943) on the ground that the purchase of wheat involved in those cases was "for shipment out of the state without resale or processing. . . ."

Lemke and *Shafer* both preceded the unanimous holdings in *McLean, Chassaniol,* and *Parker v. Brown.* Therefore, to whatever extent there is inconsistency between *Lemke* and *Shafer* on the one hand, and *McLean, Chassaniol,* and *Parker v. Brown* on the other hand, the former have been overruled. We submit that there is no inconsistency, and that the dividing line established by all of these cases rests upon whether the regulation occurs at a point which involves some processing prior to shipment. Regulation of the pre-processing stages, such as the compression of cotton, and the packaging of fruits and vegetables, occurs prior to the time that the produce has begun its interstate journey. The state of origin can impose its police power regulations at these stages free from commerce clause strictures. The commerce clause comes into play at the time that the goods are delivered either to a carrier or to an elevator for shipment without resale or processing.

The court's reliance on *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928) and *Johnson v. Haydel,* 278 U.S. 16 (1928), is misplaced because of a dispositive factual difference between those cases and the instant case. Those cases held unconstitutional a Louisiana statute requiring that the hulls and heads be removed

from shrimp taken in Louisiana before they were shipped out of the state. The State of Louisiana asserted that the purpose of the statute was to preserve the hulls and heads for Louisiana use. There simply was no basis for this contention. The Court observed that, "Not more than half the hulls and heads removed in Louisiana is used for any purpose. They have no market value, cannot be sold or given away, and often constitute a nuisance." 278 U.S. at 9. Under these circumstances, the Court concluded that the ". . . provisions of the act to be restrained show that the conservation of hulls and heads is a feigned and not the real purpose." 278 U.S. at 10.

The principle of the *Haydel* cases is simple and salutary, but totally inapposite to the instant case: Where the asserted state interest is merely a sham, or a facade behind which the state attempts to keep within its own borders certain aspects of commerce, such as the packing business, such a practice is invalidated by the commerce clause. Cf. *Baldwin v. Seelig,* 294 U.S. 511 (1935); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964). The dispositive fact in the *Haydel* cases was that there was simply no proper state purpose which could be ascribed to the regulation; consequently, this Court concluded that the real purpose had to be to immunize the Louisiana shrimp packing business from out-of-state competition.[6]

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[6] In fact, there is a local industry within the State of Arizona which is very much concerned over the lower court's holdings. It is not, however, the packing industry; it is the Arizona Vegetable Growers Association. Both before the lower court, and also before this Court, counsel for the Arizona Vegetable Growers Association have been associated with the State Attorney General's office, at the expense of the Arizona Vegetable Growers Association, to defend the constitutionality and enforceability of the Fruit and Vegetable Standardization Act. The members of this Association are in the business of producing and marketing Arizona fruits and vegetables. They have seen the great benefits which have come to their industry over the years through the enforcement of minimum uniform standards of quality and pack applicable to all fruits and vegetables shipped from the State of Arizona.

In the instant case, by contrast, the parties have stipulated that the purpose of the Act is to promote the reputation of Arizona fruits and vegetables in interstate commerce. The legitimacy of this interest is squarely established by the unanimous holding of this Court in *Sligh v. Kirkwood.* Therefore, the governing cases are not the Louisiana shrimp packing cases, but rather *Sligh v. Kirkwood, Cooley v. Board of Port Wardens, South Carolina v. Barnwell,* and *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*

This Court has made it very clear that if there is a proper and legitimate purpose for state regulation, Federal Courts will not hold that the true purpose of the regulation is one which would render it unconstitutional. *Daniel v. Family Security Life Ins. Co.,* 336 U.S. 220 (1949). In fact, the purpose of the Arizona Fruit and Vegetable Standardization Act is and always has been to "promote the development of the Arizona fruit and vegetable industry in interstate and foreign markets. . . ." Preamble to Chapter 95, 8th Legislature, State of Arizona (1929). The district court has declared that it has not held the entire Act unconstitutional, referring to "the legitimate interests of the State of Arizona." The lower court has, however, held unconstitutional the enforcement procedures of the Act by precluding inspection by Arizona Inspectors to determine whether the standards of the Arizona Act have been met. This, we submit, is equally disruptive to "the legitimate interests of the State of Arizona," as well as those of many other states, and raises substantial federal issues which merit at least one appellate review.

CONCLUSION

The lower court's cryptic treatment of the constitutional issues does not even mention *Sligh v. Kirkwood, Cooley, McLean* and *Chassaniol,* even though they were extensively briefed and argued. Indeed, the lower court's opinion is completely devoid of any reasoning or guidelines which the appellant might use as the basis for determining how he might properly, if at all, go about implementing what the lower court's opinion concedes to be "legitimate interests of the State of Arizona." Accepting the lower court's premise that Arizona does have a legitimate interest in enforcing its Fruit and Vegetable Standardization Act, the appellant is at a complete loss to know how to achieve these interests in light of the court's opinion.[7]

It is not possible for the appellant to make his inspection to determine whether quality standards have been met at any stage of the preparation of cantaloupes for marketing other than at the packing stage. Therefore, unless the appellant is free to enforce his order requiring that cantaloupes be packed in the State of Arizona, he has no way of assuring himself that the quality standards for Arizona cantaloupes specified by the statute, e.g. that "cantaloupes shall be free from mold, decay and insect damage . . . and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting," etc. have been met, because there is no way that he can inspect cantaloupes for these defects once they have left the state. Similarly, the ap-

[7] The principal thrust of the appellee's position taken before the lower court was that Arizona's interests would be vindicated because of the appellee's announced intention to pack its cantaloupes in California, which also has a Fruit and Vegetable Standardization Act. In the first place, the standards of the two Acts pertaining to cantaloupes are not identical. Even more important, it would seem elementary that Arizona is entitled to enforce its own law through its own inspectors. It would indeed be a hollow right if Arizona is entitled to enact standardization laws, but must depend for their enforcement upon the enforcement officers of a sister state. The existence or non-existence and similarity or lack of similarity of a standardization law in California are therefore irrelevant.

pellant is powerless to carry out his statutory responsibility to assure that all cantaloupes are packed in closed, standard containers approved by him if the packing, in fact, occurs outside the State of Arizona.

The appellant finds himself in this dilemma: unless the decision of the lower court is reviewed by this Court, it will not be reviewed at all, and appellant will be left with a judgment and opinion which assures him that Arizona has a legitimate interest in enforcing its Fruit and Vegetable Standardization Act, but without any means of ascertaining how he may go about enforcing that Act.

It is respectfully submitted that the issues in this case are substantial, and that the appellant is entitled to an appellate review of the lower court's judgment. Accordingly, we urge that jurisdiction be noted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRUCE CHURCH, INC., a California corporation,

Plaintiff,

vs.

L. J. PIKE, as Supervisor of Inspection the Arizona Fruit and Vegetable Standardi tion Service, et al.,

Defendants.

No. Civ-6702 Phx.
OPINION AND ORDER

CRAIG, D. J.

The within action was instituted by plaintiff, Bruce Church, Inc., a California corporation, against L. J. Pike, as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, and others.

Plaintiff is engaged in extensive agricultural operations, including the growing, harvesting, packaging and shipping of agricultural products in California and Arizona.

In 1964 plaintiff entered into a lease with the Secretary of the Interior, the Commissioner of Indian Affairs, the Colorado River Indian Agency and the Colorado River Indian Tribes under the terms of which plaintiff undertook, at substantial expense, to develop 6,400 acres of unimproved land in the Colorado River Indian Reservation near Parker, Arizona. Plaintiff does not have packing facilities at Parker and at least in the foreseeable future apparently had no intention of developing packing facilities at that location for the reason that it had adequate facilities at Blythe, California, some 31 miles distant, which could be economically used in sorting, grading, packing

and shipping the produce grown and harvested on the Arizona side of the river. It was plaintiff's intention and practice to harvest its melons grown in the Parker area, to load them in trailers and to haul the bulk load to plaintiff's packing facilities at Blythe, where the melons were sorted, inspected, packed and shipped.

Title 3, Chapter 3, Article 4, Arizona Revised Statutes, constitutes the Arizona Fruit and Vegetable Standardization Act (§§ 3-481 et seq., A.R.S.). § 3-483 of the Act provides for the creation of the office of Supervisor of Inspection, charged with the responsibility of enforcing the provisions of the Act. Defendant Pike currently holds that position. The Arizona Act includes certain requirements with respect to containers, labeling, inspecting, grading, licensing, etc., and provides certain sanctions for failure to comply with the provisions of the Act or the Rules and Regulations promulgated thereunder.

In March, 1968, defendant Pike, acting in his official capacity and under his interpretation of the Fruit and Vegetable Standardization Act, *supra,* notified plaintiff that no future transportation of bulk shipments of cantaloupe harvested by plaintiff would be allowed out of the State of Arizona to the plaintiff's packing facilities at Blythe, California.

Under the provisions of Article 1, § 8 of the United States Constitution (Commerce Clause) and Article 6 of the United States Constitution (Supremacy Clause) and pursuant to the provisions of Title 28 U.S.C. § 2201, plaintiff instituted this action questioning the constitutionality of the Arizona Fruit and Vegetable Standardization Act, *supra,* insofar as its enforcement by defendant Pike under his interpretation of the Act constitutes an unreasonable and unlawful burden upon interstate commerce. This Court has jurisdiction by virtue of Title 28 U.S.C. § 1331 and Title 28 U.S.C. § 1332.

The complaint questions the constitutionality of a state statute. Consequently, Three Judge Court was convened pursuant to

Title 28 U.S.C. §§ 2281, 2284. In order to conserve the crop then being harvested, a temporary restraining order was issued by this Court and continued by stipulation until a hearing on the merits on June 7, 1968.

A temporary injunction issued from this Court pending ultimate determination of the issues, which injunction restrained the defendant Pike from further acts of deterrence with respect to plaintiff's bulk shipments of melons from its farms in Arizona to its packing plant in California.

The parties have entered into an agreed statement of facts as to which this Court has taken notice. The parties have submitted memoranda in support of the respective positions of the parties.

We are first confronted with the question as to whether the abstention doctrine should be invoked in this case. To paraphrase the question propounded by the United States Supreme Court in *Burford v. Sun Oil Co.*, 319 U.S. 315, 318, 63 S.Ct. 1098, 1099, and quoted in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 71 S.Ct. 762:

> "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"

Many cases involving Three Judge Courts with jurisdiction predicated upon both the presence of a federal question and diversity of citizenship have invoked the abstention doctrine. *See Harrison v. NAACP*, 360 U.S. 167, 79 S.Ct. 1025; *Alabama Public Service Commission v. Southern Railway Co., supra.* The issue here is whether this case presents a situation in which this Court should exercise the power of abstention. Apparently there is no clear cut rule existing to guide a Court in making this determination. Certain criteria, however, appear in existing decisions that indicate when it is appropriate to exercise the power of abstention. In *Harrison, supra,* the Court stated:

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should at all times actuate the federal courts,' (authorities cited) as their 'contribution * * * in furthering the harmonious relation between state and federal authority * * *.' (authorities cited) In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (authorities cited) This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. (authorities cited)"

A recent discussion of the abstention doctrine in *Zwickler v. Koota,* 88 S.Ct. 391, 395, states that the power should be exercised "only in narrowly limited 'special circumstances'." Among the "special circumstances" noted in *Zwickler* are (1) the susceptability of a state statute to a construction by the state courts that would aovid or modify constitutional questions before the federal court, and (2) the possibility that adjudication would disrupt state administrative processes. In *Zwickler* neither of these "circumstances" was present, and the court held, therefore, that it was error for the district court to apply the doctrine. The court found application of the doctrine inappropriate where plaintiff attacked a state statute on its face as being repugnant to the First Amendment. We do not believe the instant case an appropriate one to invoke the abstention doctrine.

The Arizona Fruit and Vegetable Standardization Act has never been constitutionally construed by the Arizona courts, nor

do we believe it necessary to the disposition of this case to determine the constitutionality of that Act. Moreover, a present adjudication of this case through constitutional interpretation might well disrupt the legitimate interests of the State of Arizona.

A reading of the Act reveals no clear basis nor authority for the issuance of the order by the defendant, Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, which order has been attacked by the plaintiff in this case. The constitutionality of the Act, then, is not in question. What is in question is the construction placed upon the Act by the Superintendent and the constitutionality of the order issued by him pursuant to his construction.

A review of the agreed statement of facts and the Act in question indicates that the order complained of constitutes an unlawful burden upon interstate commerce. *See Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1, 49 S.Ct. 1; *Johnson v. Haydel,* 278 U.S. 16, 49 S.Ct. 6; *Schafer v. Farmers Grain Co.,* 268 U.S. 189, 45 S.Ct. 481; *Lemke v. Farmers Grain Co.,* 258 U.S. 50, 42 S.Ct. 244. If the application of the Arizona Fruit and Vegetable Standardization Act, as interpreted by the Supervisor of Inspection, could be construed to be a valid interpretation and application of the statute, then the statute so interpreted and applied is unconstitutional.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the injunction heretofore issued restraining the defendant, L. J. Pike, his deputies, agents, servants, employees and attorneys and all persons in active concert and participation with them from in any manner, either directly or indirectly, threatening, ordering, attempting or acting (a) to hinder, interfere with, impede, restrain, prohibit or prevent plaintiff from harvesting its crops of cantaloupe grown by plaintiff in the State of Arizona, in the vicinity of Parker, Arizona, and from transporting said cantaloupe in bulk into the State of California; (b)

to seize and take possession of any crops harvested, loaded or transported; (c) to take any action to forfeit bonds, or to deny or revoke licenses of the plaintiff because of harvesting, loading or transporting such crops; or (d) to take any other action penalizing, injuring or damaging plaintiff on account of or because of such harvesting, loading or transporting in interstate commerce shall be permanent.

DATED this 4th day of March, 1968.

CHARLES M. MERRILL
Charles M. Merrill, U.S. Circuit Judge
WALTER E. CRAIG
Walter E. Craig, U.S. District Judge
C. A. MUECKE
C. A. Muecke, U.S. District Judge

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,

Appellant,

vs.

BRUCE CHURCH, INC., a California corporation,

Appellee.

On Appeal from the United States District Court for the District of Arizona

MOTION TO DISMISS OR AFFIRM

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

BRUCE CHURCH, INC.,
a California corporation,
Appellee.

On Appeal from the United States District Court for the District of Arizona

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court, under Rule 16 of the Court's Rules, to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment sought to be reviewed, on the ground it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

The Jurisdictional Statement of the Appellant was received by Appellee on June 28, 1969. Subsequently, an extension of time for the filing of this Motion was

granted by the Clerk under the provisions of paragraph 5 of Rule 34 to August 20, 1969.

The Motion is based in part on procedural deficiencies relating to the appeal and in part on the unsubstantiality of the questions involved.

I

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT, BECAUSE NOT TAKEN IN CONFORMITY WITH THE RULES OF THE SUPREME COURT

This Court has declared that a "review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before" this Court. *Brown Shoe Co. v. U. S.*, 370 U. S. 294, at 305, 306 (1962).

With respect to the Jurisdictional Statement itself, the Court has provided in Rule 13, paragraph 2, that it "shall comply in *all* respects with Rule 15" (emphasis added).

Examined in light of the matters required by Rule 15 to be set forth "in the order" specified, it will be found that:

1. The Jurisdictional Statement contains no reference to the statute pursuant to which the proceeding was brought, as required by Section 1(b)(i). The "nature of the proceeding" below is only partially indicated.

2. The Jurisdictional Statement fails to state the Court in which the Notice of Appeal was filed, as required by Paragraph 1(b)(ii).

3. The Jurisdictional Statement contains no citation of cases believed to sustain the jurisdiction, as required by Paragraph 1(b)(iv).

4. The Jurisdictional Statement contains no citation of the volume and page where the State statute involved may be found in the official edition, as required by Paragraph 1(b)(v).

The items mentioned do not appear to be set forth anywhere in the Statement.

The deficiencies cited may appear peripheral, yet this Court, in its wisdom, has seen fit to prescribe these rules to be observed where a party seeks to invoke the jurisdiction of the Court on appeal. Unless accompanied by sanctions, the rules can have little significance. By its Rule 16, this Court has expressly provided, as a ground for dismissal, that the appeal has not "been taken in conformity to statute or to these rules."

We submit this is an appropriate case for application of Rule 16.

II

THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

1. Introductory.

In support of his Jurisdictional Statement, Appellant undertakes to persuade this Court that "the questions presented are substantial" (p. 11, 26). Appellant asserts:

> "Any time that any aspect of an important state statute is declared unconstitutional by a federal court, the issue can hardly be said to be anything but substantial. Similarly, whenever a three judge federal district court interprets an important state statute in such a way as to effectively render it unenforceable, and the only appeal from that interpretation is to this Court, the issue is substantial . . ." (p. 11).

We respectfully submit Appellant mistakes the question now before this Court. The matter before the Court at this time is not whether the issue involved is "a substantial" one. Rather, the question before the Court is whether the issues raised are "so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution" (Rule 15,1(f)). Appellant's formulation of the issue here would ignore completely the criterion established by this Court. Appellant's statement is tantamount to saying that every matter of this nature *must* be accorded a hearing on appeal, without regard to its substantiality as contemplated by the Court's rules. This is indeed a novel proposition which would render the Court's criterion for selective review meaningless.

We respectfully submit Appellant's Jurisdictional Statement fails to set forth any grounds for concluding that the questions presented are of such a substantial nature as to require plenary consideration within the intent of the Court's criterion. No grounds are shown why the decision of the Judges constituting the three-judge Court empaneled by the Chief

Judge of the Ninth Circuit to hear the case, arrived at by unanimous decision and reaffirmed after two motions by Appellant for re-hearing, requires further hearing or argument. We submit there is ample ground for finding to the contrary, that the hearing already afforded Appellant and the decision of the three judges, in line with earlier precedents set by this Court, leaves no issue of such a substantial nature as to require further hearing by this Court.

2. Question presented.

The question presented by this case is clear and simple. It is whether Appellant, a state official acting as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, and purporting to act under the authority of a statute of Arizona, may, under the facts and circumstances of this case, prohibit Appellee from transporting cantaloupe crops grown by it at Parker, Arizona, across the State line into California, a distance of about 31 miles, for processing and packing at Blythe, California, where Appellee maintains packing sheds and other facilities for that purpose. The record shows that once in California, the produce is processed and packed in accordance with standards and requirements established by the laws of California, which are as stringent, if not more so, than those of the State of Arizona, and that the produce is packed in the very same containers as are in use in Arizona.

The three-judge Court held that to forbid Appellee to so process and pack crops in California imposes an undue burden on interstate commerce, is unconstitu-

tional, and should be enjoined. The Court did not hold the Arizona Act, as a whole, unconstitutional nor did it hold the enforcement provisions of the Act unconstitutional, as suggested by Appellant (Jurisdictional Statement, p. 5). The Court, very clearly addressing itself to the facts of this case, held simply that "If the application of the Arizona Fruit and Vegetable Standardization Act, as interpreted by the Supervisor of Inspection, could be construed to be a valid interpretation and application of the statute, then the statute so interpreted and applied is unconstitutional".

3. The surrounding facts and circumstances.

The pertinent facts of the case were presented to the Court below by stipulation of the parties. We respectfully submit the parties were not "instructed" by the Court to bring in a stipulation of facts, as asserted by Appellant (Jurisdictional Statement, p. 11). Rather, the Court suggested to the parties that they consider the possibility of such a stipulation in this case, a suggestion which counsel for both sides considered an apt one and which they found they could, in deed, effectuate (Transcript of Proceedings, June 7, 1968, p. 33-34). Except for brief court testimony and depositions of Appellant and David R. Gipe, an officer of Appellee, which were made part of the record an appeal, the facts are set forth in detail in this stipulation. We will not undertake to repeat them here. It will be apparent, however, that they are quite extensive and include a description of Appellee's operations, past practice of Appellant in respect of

permitting transportation of cantaloupes across the State line into California for processing and packing, the issuance of the order in question, and its impact upon Appellee.

Briefly, the facts presented to the Court jointly by the parties show that Appellee is an independent, family-owned and controlled company which has been engaged for many years in the growing, harvesting, transporting, processing, packing and shipping of various kinds of fruits and vegetables in the States of Arizona and California. Almost all of its products are produced for sale, and are sold and shipped in interstate and foreign commerce (Stip. p. 3, L. 28 to p. 4, L. 1). Appellee carries on growing and shipping operations at various locations in these States and at such times of the year as to produce a continuing supply of the agricultural products desired by its customers. In this way, Appellee is able to supply cantaloupes, among other commodities, during the entire production season in the growing areas of the West.

Further, by conducting its operations in this manner, Appellee is able not only to increase its production and achieve greater economy and efficiency, but also to effect a more even supply and thereby diminish to some extent the ups and downs of the produce market. This works to the advantage not only of Appellee but also of the buyers and the ultimate consumers insofar as it tends to reduce extreme price fluctuations (Stip. p. 4, L. 13-29).

As part of this operational plan, Appellee finds it advisable to locate its packing and processing estab-

lishments at centralized locations close to rail and air freight facilities which will be adequate to handle the crops from the several nearby growing areas. This is true in the case of growing areas which, although in different States, are within a workable distance of one another, as in the case of Parker and Blythe. The centralized packing facility provides great assurance that produce reaching the markets will be of the highest standards and quality. It also make it possible to train and develop a highly skilled, year-'round labor force which can assist Appellee in maintaining its reputation, which Appellant itself has admitted is "one of the finest in the business" (Stip. p. 5, L. 1-29 and p. 6, L. 21 and 22).

At Parker, Arizona, Appellee has had under development for several years a large tract of land containing over 6400 acres. These are being developed under the terms of an agricultural lease entered into with the Secretary of the Interior of the United States of America, as Lessor, the Commissioner of Indian Affairs, the Colorado River Indian Agency and the Colorado River Indian Tribes, the lease to extend for a period of 25 years. When the lands were taken over by Appellee, they were barren, arid, uncultivated lands in the Colorado River Indian Tribes Reservation at Parker, covered with brush and mesquite. By the expenditure of great physical effort and very substantial sums of money (between three and three and one-half million dollars at the time this matter first came before the Court) Appellee has been able to develop these lands to a point where they have

begun to be productive. The nature and scope of this undertaking is described in more detail in the Stipulation of Facts.

One of the crops developed at Parker is a cantaloupe crop. This was done as part of Appellee's overall plan to develop a continuing supply of high-quality cantaloupes for its trade. For many years past, Appellee has been growing cantaloupes on its farm lands at Yuma, Arizona, and has also been growing cantaloupes in the San Joaquin Valley, the Huron District, and at Mendota, in California (Stip. p. 8, L. 27-30). The Parker District is well suited for the production of a high-quality cantaloupe (Stip. p. 8, L. 26-27), and its maturity and harvest dates fit in well with Appellee's other cantaloupe production schedules. Cantaloupe production at Parker started in 1966 and has continued each year thereafter. In 1968, when this matter came before the Court, the Company had under production there approximately 501 acres, with an estimated crop value of $700,000.00 (Stip. p. 8, L. 23).

Cantaloupes are a highly perishable crop and must be harvested, processed and packed for shipment promptly on reaching maturity, or the crop will spoil and become worthless (Stip. p. 8, L. 17-20). This calls for suitable and adequate processing and packing shed facilities with necessary rail sidings. However, while such facilities have been available to Appellee at Blythe, just across the State line in California, none have existed at the Parker Ranch (Stip. p. 9, L. 15-18). To establish such facilities at Parker

would require more than the expenditure of approximately $200,000.00 for a shed, referred to by Appellant (Jurisdictional Statement, p. 10). It would also require bringing in rail siding for some 20 miles, acquisition of land and easements, and detailed engineering work and development of plans and designs (Stip. p. 9, L. 18 to p. 10, L. 3). Such an expenditure of capital, if made necessary because of the imposition of restrictions such as Appellant seeks to impose here, rather than because of sound economic planning, would materially increase Appellee's costs of production, and would thereby tend to impair its competitive position in the industry (see Stip. p. 12, L. 27-32). Proper planniing in relation to Appellee's operations in the area calls for a centralized facility, capable of handling a variety of crops.

Since it commenced cantaloupe production at Parker in 1966, Appellee has used the facilities at Blythe, California. There, Appellee is afforded a centralized location with necessary railroad facilities for the proper handling of its crops grown in the general area, including the Parker district (Stip. p. 12, L. 18-26). This has enabled Appellee to carry out a more efficient and economical operation, while sending into the markets of the nation a high-grade product at a lower cost to the consumer (see Stip. p. 12, L. 30-32).

In processing and packing its Arizona cantaloupe crops at Blythe, Appellee has been following a practice permitted by Appellant and followed by other growers as well for many years since the Arizona law here in question has been in effect. As the Stipula-

tion of Fact shows (p. 15-16), for many years past various growers and shippers, with the knowledge of Appellant and without objection or complaint by him, his agents or employees, have transported cantaloupe crops as well as other agricultural crops in bulk across the State line of Arizona into the State of California for processing, packing, and further shipment in interstate commerce. This was shown in Appellant's own official departmental reports for the years in question (see Def. Ex. 5 through 18 in Deposition of L. J. Pike). This involved a variety of crops, including cantaloupes, and a number of different growers and shippers in interstate commerce. Actually, the practice antedated the years covered by Appellant's official reports, as indicated in a letter dated September 27, 1968 from the Land Operations Officer, Bureau of Indian Affairs, Parker, Arizona, which is attached to the Stipulation of Facts as Exhibit C. The letter states that "it appears that some melon crop grown on the project has been processed in Blythe, California, every year since 1948".

It was in reliance on this long-continued past practice that Appellee undertook to plant and grow its cantaloupe crops at Parker. Because of the highly perishable nature of cantaloupes, the process of harvesting them, transporting them to the shed facility, processing and packing them is a continuous, uninterrupted and rapid process, accomplished within a matter of a few hours. It has been the practice of Appellant to facilitate this process by causing his inspectors to examine the produce in the field and to

issue an inspection certificate called a "pickle worm inspection certificate", to be delivered to the California Inspector at the State line for clearance into California. This was in conformity with a practice existing at Bard, California, where produce grown in California has been taken across the State line for processing and packing in the State of Arizona. There exists a close liaison between the California and Arizona produce activities. Many growers carry on farming and shipping operations in both states, involving the same crops.

After permitting this practice for years and with full knowledge that Appellee already had its crop in the ground without any processing or packing facilities at Parker capable of handling the crop at harvest time (Stip. p. 17, L. 2-7), Appellant, on March 22, 1968, issued an order prohibiting Appellee from transporting its cantaloupe crops across the State line into California for processing and packing at Blythe (Stip. p. 16, L. 30). Absent necessary facilities at Parker, the order threatened Appellee with loss of its entire crop. The order gave no reasons for its issuance. No grounds or explanation were given. The record shows, however, that the order was directed to Appellee following Appellant's attendance at a meeting of the Board of Directors of the Vegetable Growers Association of Central Arizona. The Association is one of several growers and shipper associations in Arizona. The minutes of the meeting do not show it (Stip. p. 25, L. 4-16) but a principal subject of discussion at the meeting, according to Appellant's own testimony

in deposition, was "the Church Company moving cantaloupes across the line" (Depo. L. J. Pike, June 5, 1968, p. 55, L. 19-20). Appellant had been requested to attend this meeting (Depo. *supra,* p. 45, L. 26), but Appellee was not represented (Depo. *supra,* p. 52, L. 19-21). The record indicates further that following his mailing of the letter to Appellee, Appellant sent a copy to each of the members of the Board of Directors, apparently to inform them of the action he had taken following the meeting. As stated by Appellant: "Well, I sent them because of the fact that I attended a meeting with them when they discussed this situation" (Depo. *supra,* p. 43, L. 19-21). According to Appellant, the letter of notification was sent to certain other growers and shippers who are members of the Association, but it was not sent to all the growers and shippers in the State of Arizona (Depo. *supra,* p. 47, L. 16, p. 48, L. 3). In his deposition, Appellant testified that he had no file copies of the letters he sent except a copy of the letter he sent to Appellee. Asked why he kept a file copy of the letter to Appellee and not the others, he replied, "Well, because at the time, they are the only one in question about it that I knew of" (Depo. *supra,* p. 54, L. 13-16).

That the action was directed at Appellee, and Appellee alone, can hardly be questioned.[1]

[1]On page 8 of the Jurisdictional Statement, Appellant makes statements, unsupported by record evidence, implying that Appellant's action was related to a bill in the Arizona legislature which failed of passage. There is no evidence in the record whatever as to what the terms or provisions of any such Bill were, who "procured" its introduction, what its legislative history

4. Appellant's past practice of permitting out-of-state packing.

Appellant attempts to explain his permission of across-the-line packing in the many years prior to 1968 by arguing that this was illegality of a low-grade sort, whereas the across-the-line packing contemplated by Appellee in 1968 would have represented illegality of a high-grade sort and consequently he had to take action (Jurisdiction Statement, p. 7 through p. 8):

> "Even after the 1965 amendment, the appellant has allowed small amounts of cantaloupes to be shipped out of the State in bulk, and therefore not in 'closed standard containers approved by the supervisor.' The appellee itself was permitted to ship in bulk 400 acres of cantaloupes harvested from its Parker ranch in 1967. Stipulation, Exhibit B. Aside from this shipment, however, all of the shipments in violation of the 1965 amendment to the Act were by small shippers and in comparatively insignificant amounts. *Ibid.*"

This argument certainly does not commend itself to reason, and, we respectfully submit, is hardly the kind

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was, or what its effect, if any, would have been on the matters involved in this case. Neither the bill nor any of the matters above mentioned were in evidence in the Court below and have no part in the matter before this Court. The only reference in the Stipulation of Facts to any Bill in the Arizona Legislature is to the effect that the minutes of the meeting of the Arizona Vegetable Growers Association attended by Appellant show the following:

> "Those minutes state that current legislation before the Arizona Legislature was discussed at the meeting. Two bills were discussed. The first concerned the use of DDT and the second the bulk movement out of the State of vegetables and melons. The minutes state that the DDT Bill was referred to a Committee of the Association for further study, and that as to the latter bill, no formal action was taken by the Board." (Stip. p. 25, L. 9-16)

of argument which can have much appeal to this Court. In point of fact, the amount of cantaloupes shipped in years prior to 1968 across the State line was not at all insignificant. As Appellant's own official reports will show, they were quite comparable to the volume of shipments in 1968, but this is entirely beside the point, because if an act is illegal, it is illegal regardless of its size or scope. If it is illegal to transport 500 acres of cantaloupes across the State line into California for processing and packing, it is equally illegal to transport 300 acres or 200 acres or 100 acres.

We would rather suggest, as we did in the Court below, that Appellant's practice of permitting interstate shipments in years prior to that here in question was entirely legal, and his interpretation of the statute to permit such interstate transport was lawful and proper. We submit this long-continued practice of the administrative officer charged with administration of the law should be given effect in this case. We submit this is called for under Appellant's own line of argument on page 13, where he states:

> "In the instant case, the governing rule of statutory interpretation is that which prescribes that 'When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agencies charged with its administration.' *Udall v. Tallman,* 380 U.S. 1, 16 (1965). *Udall v. Tallman* arose in the context of a federal statute, but the principle is equally applicable to interpretation of state statutes, particularly where upsetting the administrative officer's interpreta-

tion is potentially as disruptive as in the instant case."

With this principle we agree. It is to be applied, however, with respect to the statutory interpretation which the Administrator has applied consistently and uniformly over a period of years, not to an interpretation which represents a sudden, abrupt, and arbitrary switch from the long-continued practice and interpretation upon which he has caused interested parties to rely.

5. The decision below followed earlier decisions of this Court.

The decision of the three-judge court was in keeping with established precedents of this Court. There is no contrary decision of this or of any other court presenting a conflict which needs to be resolved by this Court.

Some of the earlier decisions are cited in the opinion of the court below. Included are cases which parallel the facts of the present case very closely.

For example, there is the case of *Toomer v. Witsell,* 334 U.S. 385 (1948) where the Supreme Court had under review a statute of South Carolina which required that all boats licensed to troll for shrimp in the State's waters were to dock at South Carolina ports and unload, pack and stamp their catch there before shipping or transporting it to any other State. Certain shrimp fishermen wanted to take their catch into the State of Georgia, where they had their own facilities for processing and packing. They brought action against the South Carolina officials charged

with enforcement of the statute, seeking an injunction on constitutional grounds based on the Commerce Clause, as in the present case. The matter was heard before a three-judge Federal District Court, which upheld the statute and denied an injunction. The Supreme Court reversed, holding that the statute tended to cause an undue burden on interstate commerce in violation of the Commerce Clause and was therefore invalid and unenforceable.

Mr. Chief Justice Vinson, in his opinion stated:

> "The record shows that a high proportion of the shrimp caught along the South Carolina coast, both by appellants and others, is shipped in interstate commerce. There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomittant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry" *(Id.* at 404).

The *Toomer v. Witsell* case presented the strongest possible case for State control because of the recognized common law property interest of the State in its fish and game. Notwithstanding this, the Supreme Court found that the State could not impose conditions on shipments out of the State so as to burden interstate

commerce. The Court laid heavy stress on "the importance of having commerce between the forty-eight States unimpeded by local barriers" and upon the principle "that State restrictions inimical to the Commerce Clause should not be approved simply because they facilitate in some measure" enforcement of the State law (*Id.* at 406).

Foster-Fountain Packing Company, Inc. v. Haydel, 278 US 1 (1928), also presented a case whose facts closely parallel those of the present case. There, an official of Louisiana attempted to prohibit the transportation of shrimp out of the State of Louisiana, unless the hulls and heads had first been removed in the State of Louisiana. His action was based on the Louisiana Shrimp Act. The plaintiff, which had its processing facilities in the State of Mississippi wanted to take the shrimp out of the State of Louisiana and have them packed in Mississippi. Although the State of Louisiana had a strong common law property right in its fish and game (a feature which is not present in the instant case), the Supreme Court held that the prohibition of transportation of shrimp out of the State unless their hulls and heads had been first removed in Louisiana was unreasonable and imposed an undue burden upon commerce. The officer charged with enforcement of the Louisiana law argued that the purpose of the Act was conservation, but the Court held that in its practical operation, the law resulted in an impermissible direct burden upon interstate commerce. The Court held that the actual purpose of the Louisiana Shrimp Act was not to re-

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quirements of the Commerce Clause, it would open the way for every State in the Union to take similar action for its protection. This would then have the effect of imposing an "artificial rigidity" on commerce between the states in direct contravention of the intent of the Framers of the Constitution, who recognized that the free flow of commerce and trade among the several states was essential to the success of our federal form of Government. We respectfully submit the factors which motivated the Framers to adopt this basic policy find even stronger ground today.

The above decisions are in line with other decisions of this Court to the effect that advancement of local economic interests (as distinguished, for example, from safeguarding the public health and safety of the State) cannot serve as a justification for impeding the free flow of commerce between the States. *Dean Milk Co. v. City of Madison, Wis.,* 340 U.S. 349 (1951); *H. P. Hood and Sons v. Du Mond,* 336 U.S. 525 (1949). In the latter case this Court said:

> ". . . it is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests, that are in question here . . . ." (*Id.* at 530)
>
> "The state may not promote its own economic advantages by curtailment or burdening of interstate commerce." (*Id.* at 532)[2]

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[2]That the purpose of the Act was to serve economic interests and economic interests only is clear. The Stipulation of Facts (p. 3, L. 21-26) states: "Accordingly, the purposes for the enactment of Arizona's Fruit and Vegetable Standardization Act were

Indeed, this Court has consistently held that a State statute which, by its necessary operation, directly interferes with or burdens interstate commerce is a prohibited regulation and invalid, regardless of the purpose for which it was enacted, and will not be permitted to stand. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928); *Schafer v. Farmers Grain Company*, 268 U.S. 189 (1925); *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922).

In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. *supra* at 552, this Court stated:

> "It is the established doctrine of this Court that a state may not, *in any form or under any guise*, directly burden prosecution of interstate business" (italics supplied).

and further, at page 522:

> "If one state in order to promote the economic welfare of her farmers may guard them against competition from another state the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

At page 10 of his Jurisdictional Statement, Appellant states:

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to promote and develop Arizona fruits and vegetables in interstate and foreign commerce and to enhance the return to the producers of fruits and vegetables within this State."

Appellant's reference to this Stipulation as relating only to the purpose of enhancing the reputation of Arizona produce (p. 6, 24) clearly does not reflect the full stipulation, but avoids the last part.

> "The problem from the appellee's standpoint is thus strictly an economic one: under the Act, appellee cannot ship its cantaloupes unless they have been inspected; they cannot be inspected by the appellant unless they are packed in Arizona; and they cannot be packed except in a packing shed."

It is apparent that the effect of Appellant's interpretation, as applied to this case, according to Appellant himself, is three-fold:

(1) Appellee's cantaloupes must be packed in the State of Arizona.

(2) They must be packed in a packing shed situated in Arizona.

(3) Appellee must construct such a packing shed in Arizona.

Appellee would necessarily have to comply with all three requirements in order to be permitted to ship its cantaloupe crops in interstate commerce.[3]

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[3]At page 9 of the Jurisdictional Statement, Appellant makes certain statements which are not supported by the record. Thus, for example, he states: "The parties stipulated at the oral argument before the district court that cantaloupes can be inspected for the defects proscribed by the statute only at the packing stage," citing Transcript of Hearing of November 15, 1968, p. 70-71. Examination of those pages will disclose that this was not the stipulation at all. What appears there is simply that "the inspection best takes place at the stage of sorting, when the cantaloupes are sorted, and at the present time this can most conveniently and efficiently be done in the packing shed." Accordingly, this statement hardly suggests that inspection can take place *only* at the packing stage, but relates solely to convenience and efficiency.

Appellant makes the statement that inspection for quality defects at a stage other than the packing stage "would be inordinately disruptive to the shipper's operations and impossible for

The implications of such requirements in light of this Court's prior decisions referred to above were noted by the three-judge Court in the hearing before it. The following colloquy took place between Court and counsel for Appellant (Transcript of Proceedings of November 15, 1968, p. 36, L. 12 to p. 38, L. 13):

> "Judge Merrill: I have a little trouble, I must confess, with the legitimacy of the state interest in that unless it is being packed in Arizona.
>
> Mr. Lee: Well——
>
> Judge Merrill: Now, suppose it is being packed in California, what legitimate state interest has Arizona once the fruit has left the State? It would have a legitimate interest in fruit coming into the state——
>
> Mr. Lee: No question.
>
> Judge Merrill: —if it is sold to Arizona consumers. But I must confess I have a little difficulty in the legitimacy of the state's interest as to produce which is going to be sold interstate, and whether, if you assert such an interest, you are not categorizing or separating out an area of interstate commerce with which you have this concern, and if you are not really separating out interstate commerce for the purpose of regulating interstate commerce as distinguished from your regulation of intrastate commerce.

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the inspector to accomplish." The record contains no evidence whatever on this point.

Appellant also states that inspection of cantaloupes to determine compliance with the standardization laws "simply is not carried out in this State or any other State" except at the time cantaloupes are sorted and packed. There is no evidence whatever in the record as to how the inspection of cantaloupes is carried out in other states, except in California; and, of course, as already indicated, there is no basis for the further statement on page 9 that the "sorting and packing must be accomplished at the packing shed."

Mr. Lee: All right. Let me answer that in two parts. Of course, that is the whole case and in the answer to that particular question you solve this lawsuit. And there are essentially two answers to it, and they are both supported, in my view, Judge Merrill, and I cannot see a meaningful difference, they are both supported by square holdings of the United States Supreme Court.

The first one is that as long as you assert the regulation at a stage which involves some processing prior to shipment in interstate commerce, that is not interstate commerce. That is point number one.

And the second point is——

Judge Merrill: Still subject to the problem that I have of being able to regulate it, if it takes place——

Mr. Lee: Yes, I suppose that's true.

Judge Merrill: —distinguished from the insistence that it should take place.

Mr. Lee: Yes, I suppose that's true, because then you would be in the Toomer v. Witsell, Baldwin v. Seelig category.

Judge Merrill: *I wonder if you have any authorities, such as the shrimp cases, which would recognize your right to insist that certain processes take place in the state rather than the right to regulate those processes which actually do take place?*

Mr. Lee: *No, I don't think you will find, to be perfectly candid, I don't think you will find any statute or any case which will say that any state has the right to insist that certain processes take place in the State of Arizona. I think that is a Baldwin v. Seelig violation of the Constitution.*

> Judge Merrill: *I must confess that I have a little trouble seeing that you are not asking that"* (italics supplied).

We respectfully submit Appellant has presented no grounds which would raise a substantial question concerning the three-judge Court's application of the above-mentioned cases and principles to the facts of this case. Indeed, the colloquy between Court and counsel for Appellant set forth above reflects a necessary recognition of this.

6. Collateral arguments of Appellant do not present issues of required substantiality.

In his Jurisdictional Statement, Appellant refers to miscellaneous matters, presumably with the thought of intimating or suggesting to the Court (we will not say "advocating", because Appellant's presentation of certain of these points does not suggest he himself considers he is on solid ground) that there may be substantial issues involved calling for a further hearing by this Court. Actually, they are not issues in the case at all, certainly not substantial ones.

(a) One such matter is Appellant's reference to the laws of other states. At page 11, Appellant states:

> "The substantiality of the federal issue is compounded in the instant case by the fact that the lower court's holding has cast a shadow not only over the enforcement procedures of Arizona's Standardization Act, but also over those of all other states which have adopted standardization laws in an attempt to enhance the long-run reputation of their states' produce . . . the district

> court has necessarily held that where enforcement of a state's agricultural standardization laws would be impossible without requiring possible expenditures of money by certain farming corporations, enforcement of standardization laws under such circumstances is unconstitutional."

Then Appellant cites references to the laws of 17 states having "a standardization act of some kind."

This line of argument, we respectfully submit, attempts to raise issues where none actually exist. It is amply clear that the court below did not have before it the laws of these other states (with the exception of California, where the packing in this case was accomplished). The laws of these other states were not in issue. These laws did not enter into the pleadings. They were not subject of discussion or mention in the Stipulation of Facts. There was no showing of any kind in the court below what the terms and provisions of these laws are, their purpose, scope, or intent. There was no showing at all as to the interpretation or application of any such "standardization law" (or what a so-called "standardization law" is) in terms of shipments out of state in interstate commerce or how they would be interpreted or applied to facts and circumstances such as exist here. Actually, it would appear that these laws are not being interpreted to apply to interstate shipments at all. The Illinois statute, for example, expressly so provides, thus giving recognition, in statutory form, to the proposition enunciated by the three-judge court in this case:

> "No provision of this Act shall apply or be deemed to apply to foreign or interstate commerce excepting insofar as may be permitted by the constitution of the United States, the Acts of Congress and the treaties made thereunder, nor to transactions subject to the provisions of the 'Perishable Agricultural Commodities Act, 1930." § 161, Chapter 5, Smith-Hurd Illinois Annotated Statutes (1966).

For other examples, see § 2314, Title 15, Burns Indiana Statutes (1964); and § 5-5-1, Title 5, Utah Code (1953).

The fact is that neither party considered these "other" laws relevant to the issues tried and heard by the court below and they were not involved in any way. No mention of any such laws was made except for the general passing reference to them in Appellant's brief below, now repeated in the Jurisdictional Statement.

To argue that the decision of the court below "has cast a shadow" on these "other" statutes is, we submit, absurd.

Equally absurd, we submit, is the suggestion that the court below held to the broad, general principle stated by Appellant, namely, that "the district court has necessarily held that where enforcement of a state's agricultural standardization laws would be impossible without requiring possible expenditures of money by certain farming corporations, enforcement of standardization laws under such circumstances is unconstitutional" (p. 12). Not only does this state-

ment involve assumptions not based on record evidence (viz., impossibility of enforcement), but, we submit, is a complete distortion of the court's decision. To undertake to demean the court's decision and deprive it of the dignity to which it is entitled in the eyes of this Court by casting it in a farcical mold hardly commends Appellant's arguments to serious consideration, we respectfully submit.

Appellant's contention that these "other" laws (which includes California) have relevance here is most difficult to reconcile with the position taken by Appellant below, both at the hearing and in briefs, that the law of California, which closely parallels the law of Arizona, was totally irrelevant to the issues. Indeed, this position is expressed also in the Jurisdictional Statement, where Appellant finds it fits in with his then line of argument: "The existence or nonexistence and similarity or lack of similarity of a standardization law in California are therefore irrelevant" (footnote, p. 25).

If the law of California, after which the Arizona law "was patterned" (Appellant's Jurisdictional Statement, p. 12) is irrelevant, what possible relevance can the laws of the other states have?

We respectfully submit, the laws of the "other" states have no bearing upon the question of substantiality before this Court.[4]

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[4]Simply as an exercise, we have investigated the laws of the 16 other states cited by Appellant. We find, first of all, that Appellant's references are not to "standardization" laws as such, but to the entire body of state statutes relating to agriculture in most of the named states. For example, Florida Statutes An-

(b) Also having no bearing on the issue here, we respectfully submit, is the "abstention" doctrine to which Appellant refers in a footnote, page 13. The fact that the court below undertook in its opinion, to consider this question preliminary to the exercise of its sound discretion (*Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943)), certainly does not afford Appellant any ground for complaint. He asserts he "might have requested the lower court to abstain in order to allow opportunity for the state courts to pass on this issue" (footnote, p. 13). The issue before the Court was whether the State Supervisor of Inspection, acting under color of authority of a state statute, could constitutionally forbid Appellee from transporting its produce out of the state into California for processing and packing. If Appellant

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notated, Title 33, and Idaho Code, Title 22, relate to "Agriculture, Horticulture and Animal Husbandry". Smith-Hurd Illinois Annotated Statutes, Chapter 5, Burns Indiana Statutes, Title 15, and Tennessee Code, Title 43, deal with "Agriculture and Horticulture".

Although each of the cited statutes is of a similarly broad scope, composed of many chapters and subchapters covering diverse subjects related to agriculture, our research shows that many of them do not include anything which could be properly classified as a "standardization act" similar to or even comparable to the Arizona Fruit and Vegetable Standardization Act. No "standardization" provisions at all were found in the cited statutes of Indiana, Iowa, Tennessee or Wyoming.

Although the remaining statutes cited did contain some provisions of a "standardization" type, they have special provisions which on their face raise serious questions whether they would have any application under facts such as we have here. Indeed, as noted in the text above, certain statutes contain express provisions to the effect that they have no application to produce in interstate commerce.

In *none* of the cited statutes of these 16 other states was there found any requirement that produce grown in the state be packed in standard containers in a packing facility within the state, before being transported out of the state.

wanted to urge the Court to refrain from deciding the issue, it was open to him at all times to do so. He never did so—at any stage. Indeed, Appellant affirmatively sought an adjudication by the Court. Appellant stipulated to the Court's jurisdiction, to the fact that Appellee had no adequate remedy at law, to the fact that failure to enjoin Appellant would cause Appellee irreparable loss and damage, to the fact that the issue was not rendered moot by completion of the 1968 harvest but was a continuing issue needing to be resolved (Stip. p. 1, L. 25-27, p. 23, L. 20-32). It was only after the Court's unfavorable decision that Appellant first began to mention abstention (Motion for Rehearing and/or Clarification, dated February 4, 1969).

Appellant apparently recognizes the weakness of his position on this point since he concludes "At this stage of the proceedings, we do not feel that abstention should now be an issue . . ."

With this statement we agree. Appellant's dissatisfaction on this point should not be considered as having any bearing on the question of substantiality.

(c) Appellant poses as an issue in this case the question whether his regulatory act affects interstate commerce at all. Thus, he states as a question (Jurisdictional Statement p. 5):

> "Whether, under this Court's decisions in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934) the strictures of the commerce clause are even relevant, since the regu-

lation occurs and is terminated prior to the time that the regulated goods move in interstate commerce;"

The assertion that "the regulation occurs and is terminated prior to the time that the regulated goods move in interstate commerce" is without any support whatever in the facts of this case, which show most clearly that

(1) Appellee is an interstate grower and shipper, almost all of whose products are packed, sold and shipped in interstate commerce, including the cantaloupes here in question; and that these products are expressly grown for shipment, intended to be shipped, and are in fact shipped to markets throughout the Nation and in foreign commerce.

(2) Due in large part to the highly perishable nature of the product, the process of harvesting, hauling to shed, processing, packing and shipping of the cantaloupes is one continual, uninterrupted and rapid movement, accomplished in a matter of a very few hours, as indicated above. The product literally never comes to rest. It is not stored or warehoused, as in the cases cited by Appellant. It enters the stream of interstate commerce the very moment that it is severed from the ground.

(3) Appellant in the present case is not seeking to regulate an activity which Appellee is performing in the state. He is seeking to prevent *movement* itself, movement of the cantaloupes from Parker across the state line to Blythe. The cantaloupes are then already

on their way in the stream of commerce as part of the continuous process above described.

(4) The effect of Appellant's order, if Appellee were not to be prohibited from sending its products forth into the stream of commerce, is to require Appellee to engage in certain affirmative acts in the State of Arizona, including performing the processing and packing of its products there, doing the processing and packing in a packing shed located in Arizona, and constructing a packing shed in Arizona for such purpose—notwithstanding the existence of facilities used by Appellee for performing all the foregoing at Blythe, under similar standards and procedures, and in the same containers, as are used in Arizona.

We respectfully submit the activity involved in this case is clearly part and parcel of the flow of interstate commerce, and to contend that the issue is one of a substantial nature requiring further review by this Court is to engage in a fruitless task of attempting to draw fine lines not in accord with present-day business realities. We submit this position is amply supported by the cases we have already cited and discussed above.

The *Federal Compress* and *Chassaniol* cases cited by Appellant are basically different and wholly distinguishable from the present case. In those cases, the so-called regulatory act in question was the levy of a local tax on goods (cotton) which had come to rest in a warehouse where they could sit for a long time before entering the stream of commerce. This was the

subject of great stress by the Court in the *Federal Compress* case, 291 U.S. 17, at 21):

> "It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce, and hence is not a subject of interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end. . ."

In the present case, the cantaloupes have not come to rest in Arizona, but are on their way to California.

Cotton, unlike cantaloupes, is not a perishable commodity, and it is apparent from a reading of the *Federal Compress* case, supra, that the normal course of business in dealing with cotton is for it to be transported to a warehouse, where it comes to rest, is stored, and sometime later is compressed and sent on into the stream of interstate commerce. On the other hand, cantaloupes, as a highly perishable commodity, cannot be allowed to come to rest and be stored at any stage of their journey from the field to market, without seriously endangering their quality and marketability. They must immediately be set in motion to their ultimate destination (Stip. p. 8, L. 17-20).

In the *Federal Compress* case, the statement is made: "Before shipping orders are given, it has no ascertainable destination without the state. . . ." 291 U.S. at 21). Conversely, in our case the cantaloupes being transported by Appellee do have an ascertainable destination without the state, which is Appellee's packing facility at Blythe, California. Further, the

Federal Compress case makes note of the fact that the cotton is "withdrawn from transportation", whereas there is no such withdrawal in the case of Appellee's cantaloupes. They must immediately be carried from the field to market in the most expeditious manner.

We may point out, as is well known to the Court, that the National Labor Relations Board and other federal regulatory agencies have taken jurisdiction over transportation of goods such as are involved in the present case, on the basis that interstate commerce has come into play. The National Labor Relations Board has taken jurisdiction over employer-employee relations in the area, which is reflected in labor contracts between growers and shippers and teamsters, for example.

The fact is that even the packing operation itself is under similar National Labor Relations Board jurisdiction, and the packing process is indeed a phase of interstate commerce. We respectfully submit the *Federal Compress* and *Chassaniol* cases are of little aid in relation to the facts of this case.[5]

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[5]The same is true of *Parker v. Brown*, 317 U.S. 341 (1943), which involved a prorate activity only, affecting without discrimination all area producers and wholly intrastate in nature, as the Court stressed. It did not involve goods in process of moving to market. The goods in *Parker v. Brown*, as in the *Federal Compress* and *Chassaniol* cases, were goods in storage and could have been so for long periods of time. The Prorate Act, it may be noted moreover, was one expressly sanctioned and collaborated in by the Federal authority as being a conservation measure, consistent with the federal objectives under the Agricultural Marketing Act and the Agricultural Adjustment Act.

Appellant attempts to distinguish the cases of *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922), and *Shafer v. Farmers'*

(d) Appellant seeks to support his petition for review by variously characterizing the lower court's decision as "cryptic" p. 25), "cryptic in the extreme" (p. 12), and "devoid of any discussion" (p. 21)—as though a court is constrained to embody its views in opinions of a length and scope satisfactory to the litigants. Not only are these criticisms unfounded, but they ignore the fact that the Court's decision was based upon a detailed Stipulation of Facts drawn up by the parties themselves and came after a full and complete hearing in which the Court went into every aspect of the case—law and facts—with counsel. (See Transcript of Proceedings, November 15, 1968).

Grain Co., 268 U.S. 189 (1925), relied on by us. We respectfully submit that in so doing Appellant serves only to emphasize our point. Appellant must necessarily concede these cases hold that a state cannot regulate the purchase of grain where the grain is intended for prompt shipment outside of the state. Appellant suggests this applies to cases where the goods are to leave the state without processing. Without going into the question whether those decisions are to be so narrowly construed, we need merely point out that no processing of the goods in the present case is taking place in Arizona either. Rather, the goods are in the act of being shipped out of the state for processing.

Appellant cites the case of *Sligh v. Kirkwood*, 237 U.S. 52 (1915) as one which he believes to support his position. This case is wholly distinguishable from the present case, however. In *Sligh* there was involved a statute making it an offense to handle citrus fruits unfit for human consumption and injurious to health, and the statute was upheld by the court. In the present case, we are not dealing with goods unfit for human consumption and there is no suggestion whatever that Appellee is packing or shipping any such product. We are dealing here with an absolute prohibition of the transport of Appellee's products across the state line into California even though wholesome, uncontaminated and, as Appellant himself has admitted, of a superior quality among cantaloupes. Moreover, it is a product which has undergone an inspection by Appellant's own inspectors at the field and which has been *certificated* by Appellant himself for the boundary crossing, after which it is subjected to a rigid inspection by the California inspectors (Stip. p. 13).

Appellant complains that the Court's decision is "*completely* devoid of any reasoning or guidelines" which the Appellant might use as the basis for determining how he might properly "go about protecting his interests" (p. 25), when it is commonly known and understood that the court's function is to decide cases, not to tell the litigants how to circumvent their decisions. Actually, the Court's decision does not preclude Appellant from utilizing any means of carrying out appropriate inspections desired by him which will not constitute an undue burden upon interstate commerce. Appellant is already carrying out inspections in the field, and various other procedures discussed during the course of the proceedings and known to Appellant are available.

Appellant complains further that the Court's decision "is not the product of skill in the law of the State of Arizona" (p. 13). By what process of reasoning Appellant is able to make such an assertion is not at all clear when it is considered that the panel of three judges consists of men who literally grew up among the farms and packing houses of Arizona and California; who, as practitioners before the Bars of Arizona, California and the federal courts, acquired a close familiarity with the laws of those jurisdictions; who, as such practitioners, unquestionably had to deal with the problems of the farmers among whom they lived, and with farming practices and farming methods; and who, in their careers and capacities as judges, have undoubtedly devoted much of their time and thought to matters relating to farmers

and farming. Indeed, we can conceive of no circumstance which could more effectively clothe the judicial authority with skill and expertise in this field. We respectfully submit this intimate understanding of the practical and legal aspects of the subject matter is clearly reflected in the questions and remarks of the three judges at both hearings. (See Transcript of Proceedings, June 7, 1968, and Transcript of Proceedings, November 15, 1968.)

Appellant complains also that "unless the decision of the lower court is reviewed by this Court, it will not be reviewed at all . . ." (p. 26). Appellant is here merely begging the question. The fact that the decision below went against him does not in itself entitle him to review under the rules of this Court. Substantiality of a degree warranting a further plenary hearing must be shown, which we submit Appellant has failed to do. Furthermore, Appellant's argument ignores the fact that he has already had the benefit of a full hearing—not by a single judge, but by a panel of three judges, that the hearing was based on facts drawn up and stipulated to by Appellant himself and presented by him to the Court, that the hearing afforded Appellant an opportunity to go into all pertinent facets of the case and that the facts and issues were, indeed fully reviewed, that Appellant has presented to the three judges and they have considered not less than two successive motions for rehearing, and that the decision rendered by them consistent with prior decisions of this Court has been unanimous.

We respectfully submit Appellant's complaints have no relation to the question of substantiality before the Court and are not entitled to any weight in consideration of that question.

III

CONCLUSION

This Court has long followed a policy of strict necessity in disposing of constitutional issues. *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936).

We respectfully submit, for the reasons set forth above, that Appellant has failed to show that there exist issues of such substantiality as to require further hearing by this Court, and that Appellee's Motion herein to Dismiss or Affirm should be granted.

Dated, August 15, 1969.

Respectfully submitted,
JACOB ABRAMSON,
Attorney for Appellee.

EVANS, KITCHEL & JENCKES,
ABRAMSON & CHURCH,
Of Counsel.

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§ 3-503 A. 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection,
Arizona Fruit and Vegetable Standardization Service,
Appellant,

versus

BRUCE CHURCH, INC., a California corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

REPLY TO MOTION TO DISMISS OR AFFIRM

Most of the contentions contained in the appellee's Motion to Dismiss or Affirm have already been dealt with by the Jurisdictional Statement. Accordingly, the purpose of this Reply Brief will be to dispel possible confusion with regard to two dispositive matters:

I. This case is not governed by authorities of this Court such as *Baldwin v. Seelig,* 294 U.S. 511 (1935), *Toomer v. Witsell,* 334 U.S. 385 (1948), and *Johnson v. Haydel,* 278 U.S. 16 (1928), because the State of Arizona has made no attempt to insulate itself from any interstate competition.

II. Under this Court's holdings in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol*

v. City of Greenwood, 291 U.S. 584 (1934), the regulation in the instant case comes into play prior to the time that the goods have moved in interstate commerce.

I.

A fundamental error underlying the appellee's position is the persistent assumption that the State of Arizona, through the appellant, is requiring the appellee to construct a packing shed in the State of Arizona. Proceeding from this premise, the appellee asserts that this case falls in the same category as *Baldwin v. Seelig,* 294 U.S. 511 (1935), *Toomer v. Witsell,* 334 U.S. 385 (1948), *Johnson v. Haydel,* 278 U.S. 16 (1928), and other cases which stand for the proposition that no state can isolate for itself any segment of business arising within its borders, free from competition from other states.

The State of Arizona has imposed no such requirement, and the principle of *Baldwin v. Seelig* and similar cases is inapplicable to the facts of this case.

Arizona's Fruit and Vegetable Standardization Act prescribes standards for uniformity of pack and quality of produce shipped from this State. To comply with the statute, cantaloupes must be packed in standard containers and must be "fairly uniform in size." A.R.S. § 3-503 A. In addition, all cantaloupes in each container must be "of one variety or similar varietal characteristics." *Ibid.* Obviously, there is no way that the appellant can determine that all cantaloupes in each container are of "one variety or similar varietal characteristics," or that they are "fairly uniform in size," or even that they are packed in standard containers unless he can inspect the cantaloupes in their containers. Moreover, even as to quality requirements, *e.g.,* requirements that the cantaloupes "shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage . . ." A.R.S. § 3-503 A, the inspection, in the language of the attorney for the appellee, "best takes place at the stage of the sorting, when the cantaloupes are

sorted, and at the present time this can most conveniently and efficiently be done in the packing shed." Transcript, 70/24-71/2.

In summary, therefore, matters of uniformity and compactness of pack as required by the Act can only be ascertained by inspection of the cantaloupes in the pack, and inspection for quality defects can most efficiently and effectively be accomplished at the sorting and packing stage. It follows that inspection of the product in the pack lies at the heart of the Standardization Act. Unless he can inspect the product in the pack, the appellant has no way of ascertaining that packing standards, including uniformity of color, variety, etc., and standards of quality have been complied with.

The parties have stipulated that "cantaloupes grown at Parker are considered ordinarily to be of a higher quality than those grown in other districts in Arizona." Stipulation, 17/11-13. Arizona's Standardization Act requires that all containers of fruits and vegetables "shall bear in plain sight and in plain letters on the outside thereof" the "name of the orchard or farm where the fruit or vegetable was produced." A.R.S. § 3-499 B.1. In keeping with the overall purpose of the Standardization Act to enhance the long-run reputation of Arizona fruits and vegetables in interstate and foreign commerce, Arizona is entitled to have interstate buyers know of the fact that these high-quality Parker melons were produced in the State of Arizona. There is no way the appellant can assure that this will be accomplished if the melons are packed in California, and indeed, California law apparently has no requirement that the orchard or farm of origin be designated.[1]

At all turns, therefore, inspection of the pack is indispensable to carrying out the purposes of the Standardization Act. It is immaterial to the appellant when, where, or how the cantaloupes

[1]The appellee's agent, Mr. Gipe, testified at his deposition that California has no requirement that the field of origin be designated on the crate. Gipe Deposition, 27/1-8.

are packed; so long as the appellant can inspect the cantaloupes in the pack, he can discharge his responsibilities under the Standardization Act.

The packing shed comes into the picture solely because of the fact that, as testified by the appellee's agent, Mr. Gipe, it is not practical to pack cantaloupes in the field on a commercial basis. Gipe Deposition, 10/8-13.

The sole concern of the appellant is that he be able to inspect cantaloupes in the pack for quality, uniformity of size, uniformity of varietal characteristics, designation of farm of origin, etc. The necessity of a packing shed enters into the picture not because of any requirement of the appellant or of State law, but solely because of the fact that cantaloupes, unlike certain other fruits and vegetables, can be packed only in a packing shed.

The real issue, therefore, is whether the specification of standard containers, standard packs, and standards of quality for produce moving *out of* a state, as opposed to produce coming *into* a state, is a matter of legitimate state concern. That issue has already been resolved by this Court in *Sligh v. Kirkwood,* 237 U.S. 52 (1915), cited in our Jurisdictional Statement, and by *Pacific States Box & Basket Co. v. White,* 296 U.S. 176, 56 S.Ct. 159 (1935), cited by the Amicus Brief of Western Growers Association. Involved in the *Pacific States Box & Basket Co.* case was an Oregon statute entitled "Standard Containers for Fruits and Vegetables." That statute vested in the State Director of Agriculture the power to fix and promulgate "official standards for containers of horticultural products" "in order to promote, protect, further and develop the horticultural interests" of the State of Oregon. 296 U.S. at 178. The statute further provided that after a standard container had been prescribed, it was unlawful for anyone "to pack for sale or transport for sale, or sell, the article in a container unless it conforms to the standard." 296 U.S. at 179. The order at issue in that case prescribed that strawberries

and raspberries be packed only in certain containers known as "hallocks." The plaintiff manufactured a type of container other than a hallock, and challenged the constitutionality of the statute on commerce clause and other grounds. This Court, in a unanimous opinion written by Mr. Justice Brandeis, upheld the constitutionality of the statute. The following quotations taken from Mr. Justice Brandeis' opinion clearly establish the legitimacy of state standardization acts:

> The power of a state to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition, is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See Turner v. Maryland, 107 U.S. 38, 51-54, 2 S. Ct. 44, 27 L.Ed. 370. Latterly, with the broadening of the field of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended, 296 U.S. at 181.
>
> * * * * *
>
> Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the Constitution of the state permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may inquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted. *Id.* at 182.

II.

The central fact in this Court's unanimous holdings in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934),

and *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934) — a fact which the appellee overlooks — is that the cotton involved in those cases was compressed only *after* shipping orders had been received. Mr. Justice Stone's opinion in the *McLean* case states as follows:

> Upon shipping orders given by the holders of the warehouse receipts, appellant compresses the cotton into bales of standard weight and size, suitable for shipment, and delivers them to the rail carrier for interstate transportation. 291 U.S. at 20.

McLean and *Chassaniol* upheld the tax upon both the warehousing function and also the compressing function. The basis of those decisions was that neither of these functions was insulated from state regulation by the commerce clause because, "ginning cotton, transporting it to Greenwood, warehousing, buying, *and compressing it there,* are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce." *Chassaniol v. City of Greenwood,* 291 U.S. 584, 587 (1934). (Emphasis added.)

Therefore, the fact that cantaloupes have a shorter storage period than cotton is immaterial, since the compression involved in *McLean* and *Chassaniol* occurred only after shipping orders had been received.[2] For purposes of determining the constitutionality of an asserted burden on interstate commerce, the commerce clause does not come into play where the state regulation is imposed at a stage prior to shipment of the goods in interstate commerce.

---

[2]For reasons set forth in the Jurisdictional Statement, we do not believe that *Shafer v. Farmers Grain Co.,* 268 U.S. 189 (1925), and *Lemke v. Farmers Grain Co.,* 258 U.S. 50 (1922), are inconsistent with the rule that for purposes of determining commerce clause constitutionality of state regulations, the commerce clause is inapplicable to regulations applied to functions which precede shipment and are merely preparatory to shipment. However, if there is any inconsistency between *Lemke* and *Shafer,* on the one hand, and *McLean* and *Chassaniol,* on the other, the latter must prevail since they were later in time.

CONCLUSION

The growing of fruits and vegetables, and the shipment of fruits and vegetables in interstate and foreign commerce, constitute one of the leading industries of the State of Arizona.

The most important legislation dealing with this major Arizona industry is the Fruit and Vegetable Standardization Act. The parties have stipulated to the benefits that this Act has accorded the growers of Arizona fruits and vegetables in enhancing the reputation of Arizona produce.

The decision of the lower court makes it impossible for the appellant to carry out his responsibility of enforcing the Standardization Act, so that the fundamental purposes of the Act itself are threatened.

It is respectfully submitted that the issues in this case are sufficiently important to warrant at least one appellate review of the lower court's decision.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

October Term, 1969

No. 301

Loren J. Pike, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

Bruce Church, Inc.,
a California corporation,
Appellee.

On Appeal from the United States District Court for the District of Arizona

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Appellant's Reply to Appellee's Motion To Dismiss Or Affirm does not undertake to respond to, or to take issue with, the various points and arguments contained in Appellee's Motion. It consists essentially of a repetition of certain arguments advanced in his Jurisdictional Statement, with reference to two propositions:

1. that the Arizona law does not require the construction of a packing shed in Arizona (He contends: "A fundamental error underlying the Appellee's position is the persistent assumption that the State of Arizona, through the Appellant, is requiring the Appellee to construct a packing shed in the State of Arizona,"—page 2) and

2. that no interstate commerce is involved here (He argues: "the regulation in the instant case comes into play prior to the time that the goods have moved in interstate commerce"—page 2).

In light of the more detailed discussion in our Motion, we do not consider further answer necessary and shall make only brief reply with respect to novel aspects of Appellant's argument, to illustrate the basic inconsistency of his position and to make brief response with reference to the case of *Pacific States Box & Basket Co v. White*, 296 U.S. 176, 56 S.Ct. 159 (1935), cited by Appellant to this Court for the first time (page 4).

I

Appellant asserts that the statute of Arizona does not in terms require Appellee to construct a packing shed in Arizona. At the same time, based on his premise that it is only in the packing shed that he can make an inspection of the cantaloupes[1] Appellant acknowledges again,

[1]Actually, as was indicated in Appellee's Motion To Dismiss Or Affirm (at page 36), Appellant is already carrying out inspections in the field, and various other ways and means are possible which he appears not desirous of utilizing. He has consistently maintained that his inspection can be carried out *only* in the packing shed, even to the extent of arguing on the basis of statements in the

as indeed he must, that Appellee must establish a packing shed and facilities at Parker, Arizona, if it is to be permitted to ship its cantaloupes out of the state.[2]

Appellant is, in effect, saying: "The law of Arizona does not in terms require it, but I am interpreting the law so as to require that you build a packing shed. How-

---

record which do not support him at all. Thus, from a statement in the record that, at the present time, inspection can "most conveniently and efficiently be done in the packing shed." (Transcript of Hearing of November 15, 1968 (p. 70-71)), he argues that inspection can take place *only* in the packing shed (see discussion, Appellee's Motion To Dismiss Or Affirm, page 22.)

In this regard, Judge Merrill inquired as follows of counsel for Appellant at the Hearing of November 15, 1968, Transcript, page 49, lines 2-6:

"Judge Merrill: It is possible in the field to determine whether the cantaloupes are edible?
Mr. Lee: That is correct.
Judge Merrill: And this can be done——
Mr. Lee: This can be done."

[2]That the inevitable consequence of the Appellant's interpretation of the Arizona law is to require Appellee to establish packing shed facilities at Parker is beyond question. This is expressly declared by Appellant in his Jurisdictional Statement, at page 10, and was noted by Judge Merrill in his questioning at the hearing. In the latter connection, see Transcript of Hearing of November 15, 1968, p. 36, L. 12 to p. 38, L. 13, discussed in Appellee's Motion To Dismiss Or Affirm, pages 21-25). Also see the Transcript at p. 51, lines 2-12, where Judge Merrill stated:

"Judge Merrill: Well, I'll tell you what is still troubling me a little bit in [sic, "is"] the distinction that I have already suggested. I think that what you are doing is creating a hypothetical packing shed, saying you can regulate. . . . You are insisting that we create one so that you can regulate it. This is what I am wondering about, whether we can go that far.
Mr. Lee: Yes, I realize that there are some conceptual difficulties with that . . ."

Appellant, of necessity, reiterates the same statement, in effect, in his Reply, at page 4: "The necessity of a packing shed enters into the picture not because of any requirement of the Appellant or of State law. but solely because of the fact that cantaloupes, unlike certain other fruits and vegetables, can be packed only in a packing shed."

ever, since the law does not in terms require it, you have no grounds for complaint."

This line of argument, advanced here for the first time, asks the Court to look to form and not to substance, an approach which this Court has wisely rejected when measuring state action against constitutional requirements. In the cases which Appellant seeks to distinguish, such as *Toomer v. Witsell,* 334 U.S. 385 (1948) and *Johnson v. Haydel,* 278 U.S. 16 (1928), the statutes involved did not in terms require the complainants to provide facilities in the prohibiting states either. However, this was the practical effect of the application given the statutes by the state authority which was prohibiting the complainants from doing their processing in the neighboring states where they did have their facilities, and this Court considered the consequences to be sufficient ground for holding the threatened action unconstitutional. It is according to the impact of the law, as interpreted and applied by state authority—and not only by its literal terms—that the law must be measured. Here, as in the cases referred to, the effect of the law, as interpreted and applied, is to prohibit interstate shipments of goods unless packed in local facilities; and here, as in the cases referred to, the result is to impose an undue burden on interstate commerce, as the three-judge court found.

In connection with his first point, Appellant asserts that "Arizona is entitled to have interstate buyers know of the fact that these high-quality Parker melons were produced in the State of Arizona"—(page 3). This statement is made in connection with a provision in the

Arizona law that calls for placing on the container the name of the orchard or farm where the fruit or vegetable was produced. However, as the record in this case shows, the containers used by Appellee, in California, which are identical to those prescribed for use in Arizona, do actually have markings on them identifying the product as an Arizona product in season (see Deposition of David Gipe, p. 60). As for interstate buyers knowing where the produce comes from, the record shows further that cantaloupes are bought in carloads by a comparatively small number of wholesale buyers and distributors who purchase directly from the grower, who are in constant touch with growing operations and growing districts, who know at all times where the products they are buying have been grown, and who generally have representatives at the site inspecting the fruit, its condition, quality, etc., to make sure that they are getting what they want. (See, for example, Transcript of Hearing November 15, 1968, p. 83-84).

As for *Pacific States Box & Basket Co.,* to which Appellant refers at page 4, this case involved merely the question whether the State of Oregon could prescribe containers to be used for strawberries and raspberries *when packed in the State of Oregon.* The complainant was an out-of-state manufacturer of containers which did not conform to Oregon's standards. He wanted to sell his containers in Oregon. Oregon did not prohibit him from transporting his containers into the state or from selling them there, but merely did not allow the containers to be used in Oregon for raspberries and strawberries. The manufacturer was challenging the Oregon

law, contending that his containers should be permitted for use in connection with these commodities. For reasons indicated in the Court's opinion, the Court concluded that the Oregon requirement was justifiable. *The case did not involve the question whether the state could require that strawberries and raspberries be packed in the State of Oregon, as a condition to shipment out of the state.* The state statute made no such requirement, and the case did not involve the question whether the state, by statute or by interpretation of the Director of Agriculture, could prohibit the transportation of strawberries and raspberries out of the state for packing elsewhere. This is amply clear from the opinion of the Court, 296 U.S. 176, at p. 184:

> "The order . . . is aimed, not at the importation or sale of other types of containers, *but at their use in Oregon by packers of raspberries and strawberries,* and the later transportation and sale of the packages. The prohibition of other types involved in prescribing the standard is nondiscriminating. It applies regardless of the origin of the containers. *The plaintiff is a manufacturer of containers, not a packer or shipper of berries.* It is not prohibited from shipping its tintop containers into Oregon; nor from selling them there . . ." (Italics supplied.)

The *Pacific States Box & Basket Co.* case has no application to the issues before this Court, and we would assume it was because of a realization of this that Appellant, who has been aware of its existence all along,[3]

[3]The case was cited by Appellant in his Reply Brief in the Court below, but on a wholly different point, namely the question of federal pre-emption.

did not see fit to make any reference whatever to this case in his Jurisdictional Statement.

II

In support of his second proposition, Appellant cites, as before, *Federal Compress and Warehouse Co. v. McLean*, 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934). Among other basically distinguishing features discussed in our Motion To Dismiss Or Affirm (p. 31-34), Appellant chooses to ignore the fact that those were tax cases involving only the question of a local tax on goods (cotton) which had come to rest in a warehouse where they could remain for a long period of time before entering the stream of commerce (a fact stressed by this Court in the *Federal Compress* case, 291 U.S. 17, at p. 21, and noted as well by the three-judge Court below, at page 50 of the Transcript of Hearing of November 15, 1968), whereas here, by contrast, the product has never come to rest in Arizona at any time, but from the moment of harvest is in continual, uninterrupted movement to the packing facility, across the line of Arizona into California, where it is immediately processed, packed and loaded aboard cars for further shipment in interstate commerce.

In respect of the Court's point that the Oregon statute did not discriminate between containers manufactured in the state and those manufactured out of the state, note may be taken of the fact that Section 3-518 of the Arizona Fruit and Vegetable Standardization Law, Arizona Revised Statutes, specifically permits transportation of cantaloupes in bulk to a packer in the state. Appellant's interpretation would now effect discriminatory treatment to a grower desiring to do his packing out of state, notwithstanding that appellant has permitted this for years.

Appellant's argument to the effect that "the fact that cantaloupes have a shorter storage period than cotton is immaterial" (page 6) has no relevance whatever to the facts of this case. Cantaloupes, as the record shows, have no storage period at all and, because of their inherent characteristics, cannot have any.

III

CONCLUSION

For the reasons set forth herein and in Appellee's Motion To Disimss Or Affirm, it is respectfully submitted that Appellant has failed to show that there exist issues of such substantiality as to require further hearing by this Court, and that Appellee's Motion should be granted.

Dated, September 9, 1969.

Respectfully submitted,

JACOB ABRAMSON,

Attorney for Appellee.

EVANS, KITCHEL & JENCKES,

ABRAMSON & CHURCH,

Of Counsel.

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IN THE

Supreme Court of the Un ted States

FILED
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October Term, 1969
No. 301

LOREN J. PIKE, as Supervisor of In ection, Arizona Fruit and Vegetable Standardization ervice,

Appellant,

vs.

BRUCE CHURCH, INC., a California cor oration,

Appellee.

On Appeal From the United States Dis ct Court for the District of Arizona.

[redacted]

Motion of Western Growers Assoc [redacted]. to File Brief as Amicus C tion for Leave and Brief of Western Growers As ciation as Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1969
No. .....

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

BRUCE CHURCH, INC., a California corporation,
Appellee.

On Appeal From the United States District Court for the District of Arizona.

JURISDICTIONAL STATEMENT.

Motion of Western Growers Association for Leave to File Brief as Amicus Curiae.

Western Growers Association respectfully moves this Court for leave to file the accompanying Brief in this case as *amicus curiae.* The consent of the attorney for the Appellant herein has been obtained, but the attorney for the Appellee herein refused to consent to the filing of a Brief by Western Growers Association as *amicus curiae.*

Western Growers Association is a trade association composed of growers and shippers of vegetables and melons in the States of California and Arizona. Its members produce 80% of the vegetables and melons

grown in these States and the value of their crops exceed one-half billion dollars annually. Together, California and Arizona produce 49% of the total volume of these commodities grown in the United States. More than 50% of their production is marketed East of the Mississippi.

The applicant has an interest in this case for the following reasons:

(1) Western Growers Association members in Arizona have a strong interest in the continued maintenance and enforcement of the Arizona Fruit and Vegetable Standardization Act and as an essential part thereof, A.R.S. Section 3—503c setting forth packing standards for cantaloupes grown in the State of Arizona.

(2) Western Growers Association members in California have their own California Standardization Act, containing standards for the quality of cantaloupes and standards for the containers and pack of cantaloupes grown in the State of California. As set forth in the accompanying Brief, if the standards for containers and packs are declared invalid or unenforceable, there remains no effective method for enforcing the standards for quality. Since in many ways the California and Arizona Standardization Acts are parallel, the decision from which this Appeal is taken puts the California Standardization Act, as well as the Arizona Standardization Act, in jeopardy.

The Brief of the Petitioner herein argues the need for review of the judgment of the Court below as to whether it improperly nullifies certain portions of the Arizona Fruit and Vegetable Standardization Act, but

it does not set forth the terms of the California Fruit, Nut and Vegetable Standardization Act or its legislative purpose, and does not argue the affect of the decision of the Court below on the continued enforcement of the California Act or whether these Acts are properly within the police power of the States.

Wherefore, Western Growers Association prays that the Court authorize the filing of the accompanying Amicus Curiae Brief.

HAIGHT, LYON & SMITH,

By GEORGE C. LYON,

Counsel for Western Growers Association.

IN THE

Supreme Court of the United States

October Term, 1969
No.

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

BRUCE CHURCH, INC., a California corporation,
Appellee.

On Appeal From the United States District Court for the District of Arizona.

JURISDICTIONAL STATEMENT.

Brief of Western Growers Association as Amicus Curiae.

By leave of this Court, Western Growers Association files this Brief as *amicus curiae.*

Interest of Amicus Curiae.

Western Growers Association is a trade association composed of growers and shippers of vegetables and melons in the States of California and Arizona. Its members produce 80% of the vegetables and melons grown in the States of California and Arizona and the value of their crops exceed one-half billion dollars annually. Together, California and Arizona produce 49%

of the total volume of these commodities grown in the United States. More than 50% of their production is marketed East of the Mississippi.

Western Growers Association believes that a major factor in the ability of these two States to market successfully this large quantity of vegetables and melons in competition with other States of the Union is based upon the standardization laws which, for many years, have been an essential part of the framework of the laws of these States. Western Growers Association, and its members that it represents, have a strong interest in the continued maintenance and enforcement of these standardization laws.

Western Growers Association has a dual interest in this matter: To speak for its members in Arizona who feel the necessity that Arizona's standardization laws should be enforced, and to speak for its California members who require the continuing benefits resulting from the enforcement of its similar standardization law for fruits and vegetables. Western Growers Association is interested that neither the Arizona Standardization Act nor the Caliornia Standardization Act for fruits and vegetables be struck down.

This case involves particularly the enforcement of the standardization laws relating to cantaloupes. The States of California and Arizona produce and market cantaloupes from late Spring to late Fall. During the Summer, these cantaloupes are marketed in competition with cantaloupes from most of the States of the Union. It

has been possible to compete with the "home-grown" cantaloupes of other States, despite much larger shipping costs, because standardization of the product, over the years, has assured, and continues to assure, the buyer of a high quality product. The thrust of the opinion of the District Court in this case, if not reversed, is to invalidate the enforcement of these Standardization Acts.

Summary of Argument.

1. No part of the standardization law can be enforced unless the cantaloupes are packed in final form for shipment, in closed containers, before the cantaloupes leave the State.

2. The standardization law constitutes a valid exercise of the police power of the State.

ARGUMENT.

The present Fruit, Nut and Vegetable Standard
tion Act of California has been in effect in Califo
for over 37 years.

The legislative intent of the Act has been (1)
promote the development of the California Fruit,
and Vegetable industry in State, Interstate, and
eign markets, (2) to protect the State's reputation,
to establish standards and standard containers, and
to prevent deception in packing, marketing, and sal
fruits, nuts, and vegetables.

The California Act, which is closely paralleled
the Arizona Act, provides (a) for standards of qua
of the cantaloupes and (b) standards of containers
packs. These standards are set forth in the Appe
to this Brief.

The standards of quality provide that the cantalo
must be free from mold, decay, and insect injury
that they be mature. As the cantaloupes are picke
the field, many are picked which contain defects
are not mature. It is only as the cantaloupes
through a packing house and are carefully culled,
the shipper has a product which complies with t
requirements. If the cantaloupes are shipped out
the State loose and in bulk as they come from the f
the State not only loses its ability to enforce pac
standards, but also its ability to enforce quality st
ards.

The Fruit, Nut and Vegetable Standardization
constitute a valid exercise of the police power of
State. In *Pacific States Box & Basket Compan*
White, 296 U.S. 176, 80 L. Ed. 138, 56 S. Ct. 159,

ALR 853 (1935) Justice Brandeis, delivering the opinion of the Court, states:

> "The power of a State to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See *Turner vs. Maryland,* 107 U. S. 38, 51-54, 27 L. ed. 370, of the purchaser, would not be otherwise than a 375, 376, 2 S. Ct. 44. Latterly, with the broadening of the field of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended."

The importance of the Florida Standardization Act, as it applies to citrus fruit, has long been recognized by this Court. We see a direct parallel between the facts and the law as it was applied to Florida citrus in the case of *Sligh v. Kirkwood,* 237 U.S. 52, 59 L. Ed. 835, 35 S. Ct. 501 (1915) and the facts and the proper applicable law in this case. In that case, the Court states:

> "We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such busi-

ness within the State. The protection of the State's reputation in foreign markets, with a consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose."

The holding of the Court below that "A reading of the Act reveals no clear basis nor authority for issuance of the order by the defendant, Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service" comes as a great surprise to the industry, particularly in light of the express language of the Act that cantaloupes must be packed in closed standard containers approved by the Supervisor.[1]

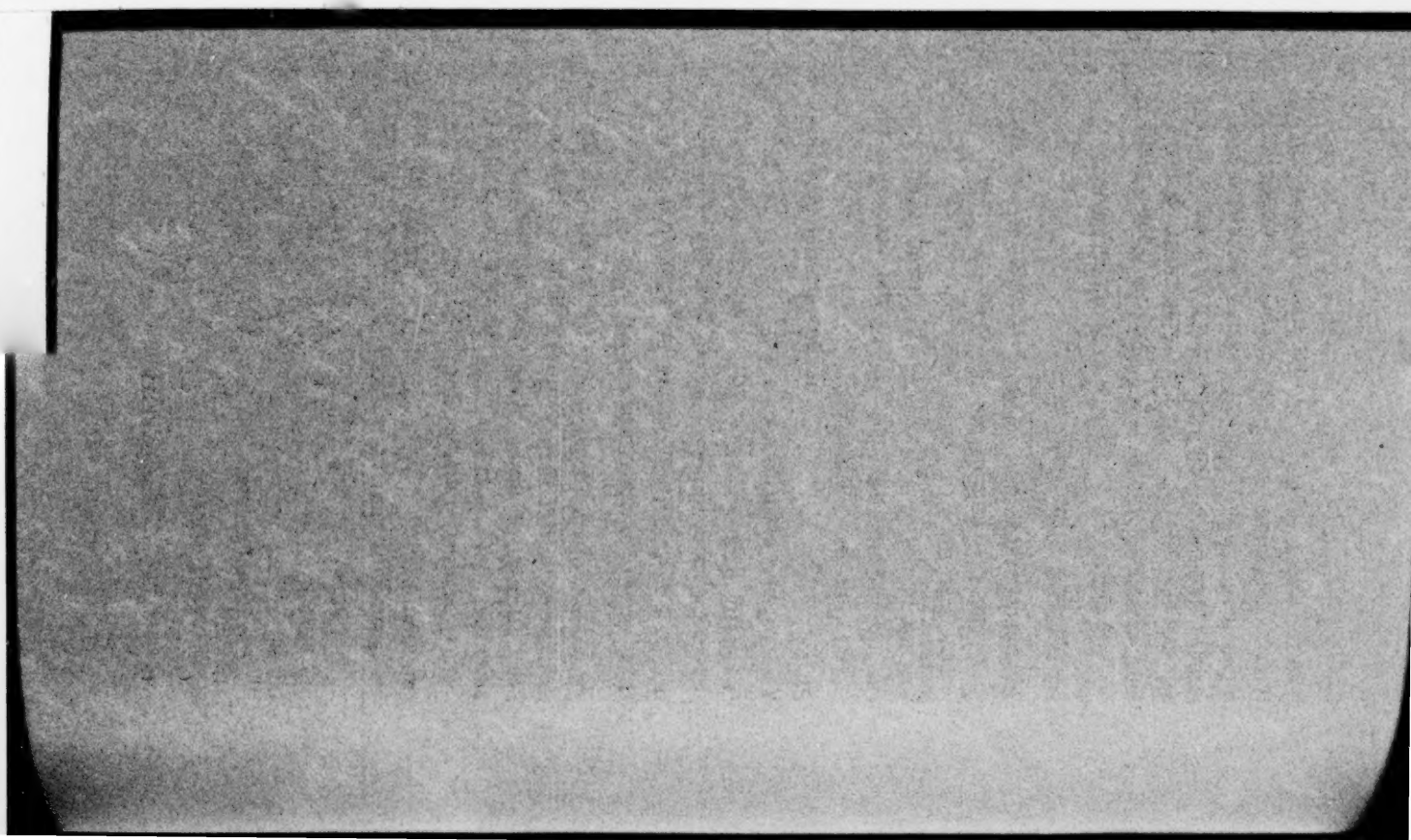
It is respectfully submitted that the issues in this case are substantial and that Appellant is entitled to an appellate review of the lower court's judgment. We urge that jurisdiction be noted.

HAIGHT, LYON & SMITH,
By GEORGE C. LYON,
Counsel for Western Growers Association, as Amicus Curiae.

---

[1]A.R.S. Sect 3-503, C.:
". . . . all cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the Supervisor except as follows:

1. Cantaloupes to be used for charitable purposes or unemployment relief, or by the United States government or its agencies
2. Any retail sales directly to a consumer."



APPENDIX.

Section 45601 of the California Agricultural Code:

"Cantaloupes shall be mature but not overripe, not poorly netted, and free from any of the following defects:

(a) Mold, decay, and insect injury which has penetrated or damaged the edible portion of the cantaloupe.

(b) Serious damage which is due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting, or other causes. Damage to any one cantaloupe is not serious unless it affects the edible portion of the individual cantaloupe."

Section 45602 of the California Agricultural Code:

" 'Mature' in the case of a cantaloupe means that the cantaloupe complies with all of the following requirements:

(a) The appearance of the outside indicates maturity.

(b) The arils which surround the seed during the development of the maturity have been absorbed.

(c) The juice of the edible portion contains not less than 8% soluble solids as determined by the standard hand refractometer."

Section 45663 of the California Agricultural Code:

"All cantaloupes shall be packed in regular compact arrangement in standard Container No. 39, 40, 41, 42, 43, 44, 44B, or 44D. All such containers shall be closed and, except as otherwise provided in Section 45664, the number of cantaloupes in each container shall be one of the 'standard pack counts' which is listed in Section 45633 for each such container."

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

Office-Supreme Court, U.S.
FILED
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No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,

Appellant,

vs.

BRUCE CHURCH, INC., a California corporation,

Appellee.

On Appeal from the United States District Court for the District of Arizona

OBJECTION TO MOTION OF WESTERN GROWERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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Appellee, subject to its Motion to Dismiss or Affirm herein, hereby files its Objection to the Motion of Western Growers Association for Leave to File Brief as Amicus Curiae, under the provisions of Supreme Court Rule 42. The grounds for Appellee's Objection are set forth below.

The rules of this Court declare that motions for leave to file briefs amicus curiae are not favored by the Court (Rule 42, paragraph 1) and that any such motion must in any event satisfy certain express requirements, including a concise statement of the nature of the applicant's interest, a setting forth of the facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case.

It was in light of these requirements that consent to the filing of a brief amicus curiae by Western Growers Association (hereinafter referred to as "Western") was withheld. The declination to consent was not that of the "attorney for the Appellee", as stated by Western, but of the Appellee itself, communicated through its attorney.

The declination was not an arbitrary one, but was based on the conviction that the above requirements of this Court are not met in this case.

Appellee's reasons for so concluding are the following:

1. All the facts and questions of law which have a bearing on the matter before the Court have been fully presented by the parties to the case in a carefully and deliberately prepared Stipulation of Facts, supplemented by deposition proceedings of principals in the case, by lengthy and thorough briefs and counterbriefs of the parties going into all the legal and factual aspects of the case, by full and complete hearings before the three-judge court during which the facts and issues were carefully explored between Court and counsel, and by two motions for rehearing filed by Appellant.

In light of this prodigious effort on the part of counsel and Court, it is inconceivable that there are facts or issues bearing on the case which have not been presented to the Court or that there are reasons for believing that they would not adequately be so presented.

2. Among the matters fully explored in this case are not only the Statute of Arizona directly involved, but also the California Fruit, Nut and Vegetable Standardization Act in which Western expresses an interest. Indeed, the latter Act entered into the Stipulation of Facts of the parties and was the subject of detailed discussion and reference in briefs of both parties. See, for example, Plaintiff's Opening Brief, pages 13, 19, 35 and 36; Defendant's Opening Brief, pages 39-46; Plaintiff's Reply Brief, pages 17-19; Defendant's Reply Brief, pages 19-21. Indeed, Plaintiff's Opening Brief contained a clause-by-clause comparison of the Arizona and California statutes, including those provisions of the California law listed in the Appendix to Western's Motion.

All of this material is part of the record before this Court, and we seriously question whether there is anything of material significance which remains to be added. Certainly, Western's Motion does not make any showing that there is anything of material significance to be added. The Motion does not address itself to the record already before the Court, and the statements contained therein must be regarded only as general statements unrelated to the work and effort already expended by the parties in relation to the record which they have presented to the Court. It may be noted that the State of California, although it has had full knowledge of these proceedings, has

not deemed it necessary to intervene in the case or ask to file brief as amicus curiae.

3. Appellant's case—the side of the case which Western favors—has been presented to this Court by the Attorney General of the State of Arizona, the highest legal officer of the State. He has had at his disposal and assisting him an entire legal staff and governmental and official access to all sources of factual information and data, to administrative practices, to governmental reports, and to legal authorities and precedents.

Furthermore, the Attorney General has had assisting him as Special Counsel eminent attorneys of the State of Arizona.

It appears further, as disclosed by Appellant's jurisdictional Statement, that on the trade association level Appellant and his counsel have had the aid and assistance of the Arizona Vegetable Growers Association. In the footnote on page 23, Appellant states "Both before the lower court, and also before this Court, counsel for the Arizona Vegetable Growers Association have been associated with the State Attorney General's office, at the expense of the Arizona Vegetable Growers Association . . ." Western's motion indicates that many of its members are parties who are members of the Arizona Association.

Under the circumstances, Appellee fails to see that Appellant is in need of assistance to present his case fully. Indeed, it is apparent from his Juridictional Statement that he has fully covered the ground so far as his case is concerned, and the arguments of Appellee in response thereto are set forth in the Motion to Dismiss or Affirm,

to which reference is made herein. Certainly Western's motion and argument disclose no new facts or issues which would have a material bearing on the case. Nothing has or would prevent Western from counselling with and/or assisting Appellant if such is its desire, just as the Arizona Vegetable Growers Association has apparently done, without the added burden to Court and counsel of additional briefs involving extra time and expense for all concerned.

CONCLUSION

For the foregoing reasons, Appellee objects to the Motion of Western Growers Association for Leave to File Brief as Amicus Curiae, and respectfully urges that this Honorable Court deny said Motion.

Dated, August 15, 1969.

Respectfully submitted,

JACOB ABRAMSON,

Attorney for Appellee.

EVANS, KITCHEL & JENCKES,

ABRAMSON & CHURCH,

Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection,
Arizona Fruit and Vegetable Standardization Service,
Appellant,

versus

BRUCE CHURCH, INC., a California corporation,
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S BRIEF

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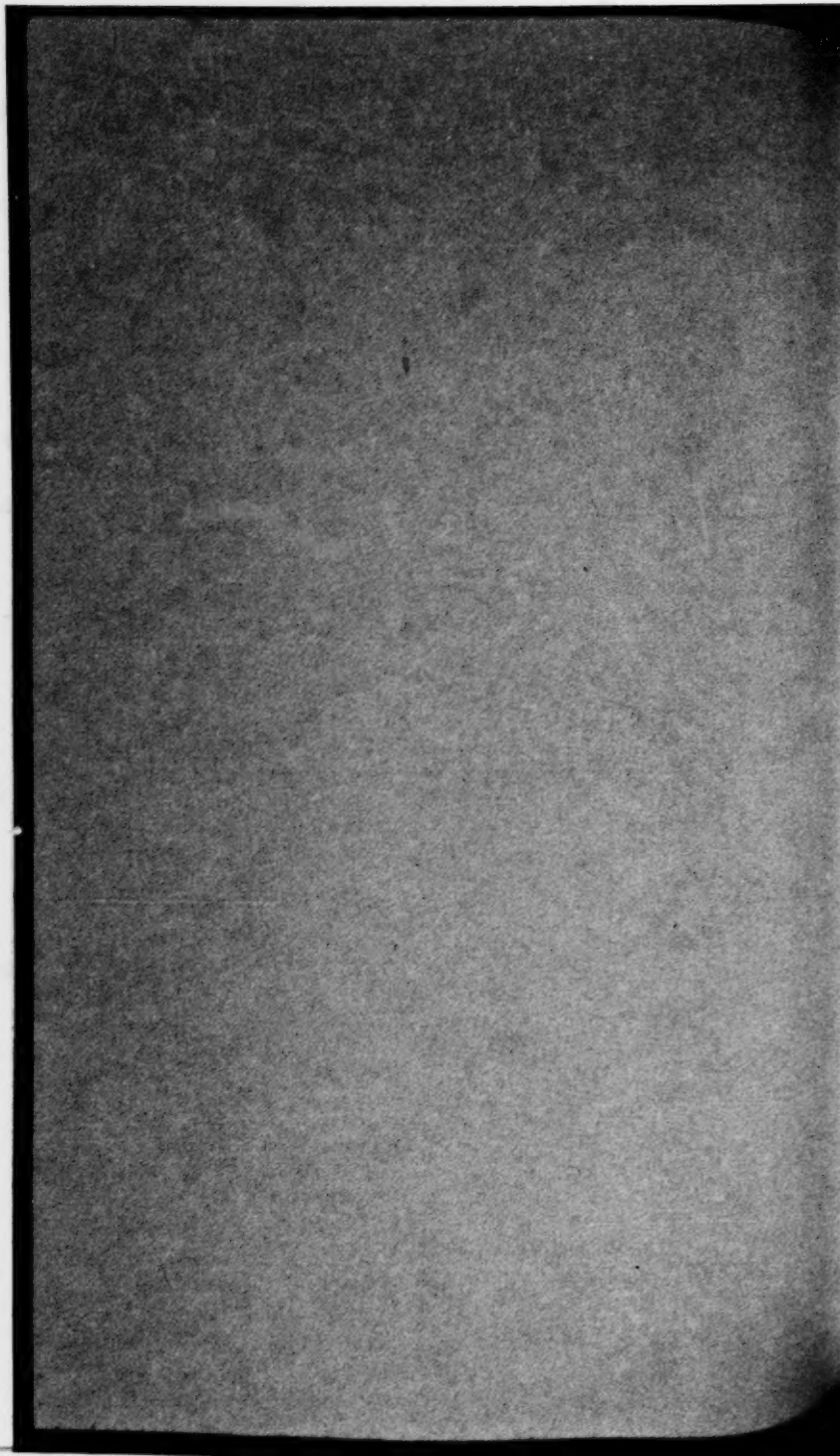

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection,
Arizona Fruit and Vegetable Standardization Service,
Appellant,

versus

BRUCE CHURCH, INC., a California corporation,
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S BRIEF

OPINIONS BELOW

The district court's original opinion was filed on January 29, 1969. Following a Motion for Rehearing and/or Clarification filed by the appellant, the court on March 10, 1969, filed a new opinion granting the judgment from which this appeal is taken. The opinion and judgment of March 10, 1969 have not yet been officially reported. A copy of the opinion is set forth in the Appendix.

JURISDICTION

A Motion for Rehearing on the opinion and judgment filed March 10, 1969, was filed on April 1, 1969, and denied by order entered May 1, 1969. The Notice of Appeal was filed May 2,

1969. This appeal is taken from the judgment contained in the lower court's second opinion and denial of the Motion for Rehearing pertaining thereto.

This Court has jurisdiction by virtue of 28 U.S.C. § 1253.

STATUTE INVOLVED

Arizona's Fruit and Vegetable Standardization Act, Arizona Revised Statutes, Title 3, Chapter 3, Article 4, prescribes minimum standards pertaining to quality and packing for Arizona fruits and vegetables. The sections of that Act which are most relevant to the issues in this case are the following:

A.R.S. § 3-481.

Definitions

In this article, unless the context otherwise requires:

* * * * *

7. "Deceptive arrangement" or "deceptive display" means a bulk load, arrangement or display of fruits or vegetables which has in the outer layer, or exposed portion, fruits or vegetables which are so superior in quality, size or condition to any of those which are concealed, or the unexposed portion, as to materially misrepresent any of the lot.

8. "Deceptive pack" means a container of fruits or vegetables which has in the outer layer or an exposed surface, fruits or vegetables which are so superior in quality, size or condition to those in the interior of the container, or the unexposed portion, as to materially misrepresent the entire content.

A.R.S. § 3-482.

Scope of article; containers

A. All fresh fruits and vegetables, when being packed, after packing, when delivered for shipment, loaded, shipped, being transported, offered for sale or sold in this state, for which grades, standards and standard containers are established in this article, shall come within the meaning of this article.

B. All lots of fruits and vegetables packed for sale, offered for sale, transported for sale or sold in this state shall be packed in new or clean containers.

A.R.S. § 3-483.

Supervisor of inspection; appointment; oath; bond; deputies and clerks; qualifications

A. There is created the office of supervisor of inspection, hereinafter referred to as the supervisor.

B. The supervisor, who shall enforce this article, shall be appointed by and shall hold office at the pleasure of the dean of agriculture of the university of Arizona, who shall also supervise and direct the supervisor.

C. The supervisor may employ and discharge deputies and clerks as his needs may require. No person related to the supervisor by blood or marriage shall be appointed deputy or clerk.

D. The supervisor shall take and file the oath of office, and shall give a surety bond to the state for the faithful performance of his duties.

E. The supervisor and deputies shall be experienced in the inspection of fruits and vegetables and in commercial packing practices, and each shall hold, at the time of appointment, a federal fruit and vegetable inspector's license.

A.R.S. § 3-503.

Cantaloupes; definitions; serious damage; standard packs; crate markings; irregular sized container; exceptions

A. Cantaloupes shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting, or other causes. Damage to any one cantaloupe is not serious unless it affects the edible portion or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof. Not more than ten per cent, by count, of the cantaloupes in any one container may be below the foregoing requirements, but not to exceed one-half of this tolerance shall be allowed for any one cause. Cantaloupes packed in the standard containers shall be fairly uniform in size. All cantaloupes in each container shall be of one variety or of similar varietal characteristics.

B. "Mature", in the case of cantaloupes, means that the appearance of the outside indicates maturity and the arils which

surround the seed during the development of maturity have been absorbed and, in addition, that the juice of the edible portion shall contain not less than eight per cent soluble solids as determined by the standard hand refractometer.

C. All containers of cantaloupes shall have appearing thereon, in plain sight and in plain letters on one outside end, the name of the person who first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready location of such packer. All cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the supervisor except as follows:

1. Cantaloupes to be used for charitable purposes or unemployment relief, or by the United States government or its agencies.

2. Any retail sales directly to a consumer.

D. As used in this section, "closed" or "lidded", as applied to containers of cantaloupes, means:

1. In the case of fibreboard containers that the opening is completely covered, except for necessary ventilation openings, with material of similar quality and strength to the adjoining portion of the container.

2. In the case of nailed wooden, wirebound, or other containers, that forty per cent or more of the opening is covered with material similar to that used in the construction of the sides and bottom of such containers, securely attached to the top.

E. In addition to the markings required by subsections B, C and D, § 3-499, each container of cantaloupes shall be conspicuously marked in letters not less than one half of one inch in height, stating the exact number of melons packed therein. Added Laws 1965, Ch. 85, § 5.

QUESTIONS PRESENTED

Section 3-503, Arizona Revised Statutes, provides, *inter alia,* that with certain exceptions all cantaloupes grown in the State of Arizona and offered for sale must meet prescribed quality standards and must also be "packed in regular compact arrangement in closed standard containers approved by the supervisor. . . ." Pursuant to this statute, the appellant, who is the

"supervisor" referred to by the statute, entered an order prohibiting the appellee from shipping its cantaloupes grown at Parker, Arizona, out of the state other than in closed standard containers approved by him. The lower court has held that this order was without clear statutory basis and that it constitutes an undue burden on interstate commerce. The questions presented are:

(1) Whether, under this Court's decisions in *Federal Compress and Warehouse Co. v. McLean*, 291 U.S. 17 (1934), and *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934), the strictures of the commerce clause are even relevant, since the regulation occurs and is terminated prior to the time that the regulated goods move in interstate commerce;

(2) Whether the Arizona Fruit and Vegetable Standardization Act, as interpreted and applied by the appellant in this case, is unconstitutional as an undue burden on interstate commerce; and

(3) Whether the lower court properly held that there was no statutory basis for the appellant's order.

STATEMENT OF THE CASE

The growing of fruits and vegetables, and the marketing of these fruits and vegetables in interstate and foreign commerce, is one of the leading industries of the State of Arizona.[1] The most important legislation governing this Arizona industry is the Fruit and Vegetable Standardization Act.

The purpose of the Arizona Fruit and Vegetable Standardization Act is to preserve and enhance the reputation of Arizona fruits and vegetables in interstate and foreign commerce. The Act accomplishes this objective by requiring minimum standards of quality and pack for all produce subject to the Act. Different types of produce are subject to different requirements.

[1] According to figures compiled by the United States Department of Agriculture, the dollar value of vegetables and melons harvested in Arizona for 1967 and 1968 was $73,767,000.00 and $67,172,000.00, respectively. By dollar value, only the states of Texas, Florida and California rank higher. United States Department of Agriculture, Statistical Reporting Service, 1968 Annual Summary of Acreage, Production and Value of Principal Commercial Crops by Seasonal Groups and States.

The prototype problem with which the Act was intended to deal is set forth in the Stipulation of Facts entered into between the parties. See Appendix 26, 28. The long-run reputation which a grower of fruits and vegetables acquires is of utmost importance to the successful marketing of his fruits and vegetables from year to year. Prior to the adoption of the Fruit and Vegetable Standardization Act, however, growers in Arizona found that it was impossible to establish a reputation for quality produce in isolation from the reputation of "Arizona produce" generally. Thus, "poor quality produce shipped by one producer often had an adverse impact upon the reputation of other shippers within the State." *Id.* at 28. Arizona growers found that poor quality and slipshod packing practices emloyed by a few shippers had the effect of demeaning generally the reputation of "Arizona" fruits and vegetables. *Ibid.*

It was to remedy this dilemma and to enhance the reputation of Arizona fruits and vegetables in interstate and foreign commerce that the Arizona Fruit and Vegetable Standardization Act was enacted. By prescribing standards for produce grown in Arizona and sold in interstate and international markets, the State of Arizona hoped to eliminate the degradation of the reputation of Arizona produce by the substandard packing practices of a few.

A closely related purpose of the Act—one to which the parties have stipulated as a primary purpose[2]—was the avoidance of deceptive packs, defined by the Act as follows:

> "Deceptive pack" means a container of fruits or vegetables which has in the outer layer or an exposed surface, fruits or vegetables which are so superior in quality, size or condition to those in the interior of the container, or the unexposed portion, as to materially misrepresent the entire content. A.R.S. § 3-481 8.

The Act accomplishes its purposes by prescribing minimum standards and enforcement procedures with regard to two separate objectives. They are: (1) intrinsic soundness and quality of the

---

[2]See Appendix 42-43.

produce itself, and (2) uniformity and compactness of packing. Implicit in the entire regulatory scheme is the prevention of "deceptive packs."

The uncontradicted evidence on the record is that "the Act has been successful in achieving its purpose."[3]

The value of standardizing containers for agricultural produce is also borne out by the practice of the United States Department of Agriculture. A number of Federal Marketing Orders prescribe that fruits and vegetables governed by the relevant order must be packed in standard containers.[4] Arizona does not have a Federal Marketing Order pertaining to cantaloupes.

Arizona is not alone in requiring standard containers for certain of its fruits and vegetables. Virtually every important agricultural state, with the exception of Texas, has a standardization act of some kind. The holding of the lower court that a state is power-

[3] The three leading cantaloupe producing states are California, Texas and Arizona. Arizona and California have Standardization Acts applicable to cantaloupes, and Texas does not. A comparison of the prices commanded by Arizona and California cantaloupes, on the one hand, and Texas cantaloupes on the other, further emphasizes the effectiveness of standardization laws in preserving the reputation of a State's produce. Random samples of reports of the United States Department of Agriculture's *Fresh Fruit and Vegetable Federal-State Market News* pertaining to sales of 36-per-pack cantaloupes sold in New York City reveal the following:

Date	Production Area	Price Range
	Yuma, Arizona	$12.50-$13.00
6/9/69	Imperial Valley, California	$12.00-$14.00
	Texas	$ 5.50-$10.00
	Arizona	$ 9.00
6/16/69	Imperial Valley, California	$ 9.00-$10.00
	Texas	$ 2.00-$ 8.00
	Arizona	$ 6.75-$ 8.50
6/23/69	Imperial Valley, California	$ 6.00-$ 8.00
	Texas	$ 3.00-$ 5.50

[4] See, e.g. 7 C.F.R. § 931.52 (fresh Bartlett pears grown in Oregon and Washington); 7 C.F.R. § 937.52 (nectarines grown in California); 7 C.F.R. § 1029.52 (fresh prunes grown in designated counties in Washington and in Umatilla County, Oregon).

less to prevent the shipment of its produce which does not conform to standards of quality and pack prescribed by that state's statutes casts serious doubt on the constitutionality of the enforcement of standardization laws in all states.

As to both of the objectives of the Act, the section pertaining to cantaloupes—A.R.S. § 3-503—is illustrative. Packing standards for cantaloupes are left largely to the discretion of the supervisor, the appellant in this case. The statute is explicit, however, in its command that cantaloupes must be packed in "closed standard containers approved by the supervisor." A.R.S. § 3-503 C. This mandate that all cantaloupes be packed in "closed standard containers approved by the supervisor" was part of a 1965 amendment. Prior to 1965, subsection G of A.R.S. § 3-503 provided that "No containers are established for unpacked or loose cantaloupes."

All enforcement of the Act is vested in the appellant, as Supervisor of Inspection. A.R.S. § 3-483.

Under present technology, it is not commercially feasible to sort and pack cantaloupes except in a packing shed, Gipe Deposition, 10/8-13; Transcript of Proceedings before lower court (hereinafter "Transcript"), 70/21-71/2, and inspection to determine compliance with the Standardization Act must be carried out after the cantaloupes have been sorted and packed. The sorting process involves more than the separation of the culls from the melons of acceptable quality. Sorting for uniformity of color, uniformity of size, and similar factors is also accomplished in the packing shed. Appendix 36, 39; Transcript, 70/21-71/2.

Inspection of the product in the pack lies at the heart of the Standardization Act. Unless the cantaloupes can be inspected in the pack there is no way that the appellant can determine that all cantaloupes in each container are of "one variety or of similar varietal characteristics" (A.R.S. § 3-503 A); that they are "fairly uniform in size" (*Ibid.*); that the higher quality melons have not been placed on the outside of the pack so as to constitute a "de-

ceptive pack" (A.R.S. § 3-481 8); or that they are packed in standard containers. Even as to quality requirements, *e.g.*, requirements that the cantaloupes "shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage . . ." (A.R.S. § 3-503 A), the inspection, in the language of counsel for the appellee, "best takes place at the stage of sorting, when the cantaloupes are sorted, and at the present time this can most conveniently and efficiently be done in the packing shed." Transcript, 70/21-71/2.

Upon analysis, inspection after sorting is not only the most "convenient and efficient"; inspection at any other stage would be impossible. Until the sorting has been accomplished, the culls have not been separated out from the fruit of acceptable quality; prior to sorting, therefore, it would be impossible for the inspectors to determine which fruit the shipper intended to put in the crates.

The appellee is a giant, multi-million dollar farming corporation, one of the largest fruit and vegetable growers in Arizona and California. At its Parker operation alone, the appellee has spent more than three million dollars in capital improvements in preparing some 6,400 acres of land for farming under lease from the Colorado River Indian Tribes. Appendix 31-32. In all, the appellee farms between 25,000 and 30,000 acres. *Id.* at 30.

At the present time, Bruce Church, Inc. does not have packing shed facilities at its Parker Ranch. Appendix 34. At the time this suit was filed, it had leased a packing shed in Blythe, California, some thirty miles from Parker. *Id.* at 37. The lease expired in November, 1968. *Id.* at 47. In any event, the leased facilities at Blythe will be inadequate for the appellee's anticipated acreage at Parker, and appellee intends to build its own shed either in Arizona or California. The appellee has considered the matter, but has not yet decided whether to build in Arizona or California. Gipe Deposition, 54/9-55/5. The

cost of a shed sufficient to serve appellee's anticipated acreage is approximately $200,000.00. *Id.* at 54/10. This cost is about 1/17th of the investment which Bruce Church, Inc. has already made at its Parker operation; less than 1/3rd the value of one single crop — cantaloupes — for one single year at Parker; and only 2/3rds of the net profits from one cantaloupe crop for one year. See Appendix 32 and 33 and Gipe Deposition, p. 47.

The matter of enforcement of the Act pertaining to cantaloupes came to a head in 1968. Following a controversy between the appellant and appellee concerning proposed enforcement of the Act, a bill to amend the Standardization Act was introduced in the Arizona Legislature. This bill—H.B. 170, State of Arizona, 28th Legislature, Second Regular Session—was described by Mr. David Gipe, Manager of appellee's Arizona operation, as follows:

> If this bill would have passed, it would have allowed with the Supervisor of Inspection's approval, the transporting of vegetables and melons to any point 25 miles from the state line for packing, shipment and interstate commerce. Gipe Deposition, 22/6-10.

Passage of the bill described by Mr. Gipe would, of course, have repealed both the requirement that cantaloupes must be packed in standard containers approved by the supervisor and also the requirement that the supervisor inspect for quality defects.

The bill, however, was defeated. The appellant, Mr. Pike, interpreted this defeat as a legislative mandate for enforcement of existing provisions requiring shipments only in closed standard containers. In Mr. Pike's words: "When they have tried to get this bill through the Arizona Legislature and the Legislature wouldn't pass it, I could see no other alternative for me only to enforce the law." Pike Deposition, 56/10-13.

Accordingly, the appellant sent a letter to the appellee and to

other interested shippers informing them that he would no longer permit bulk shipments of cantaloupes out of the State.[5]

The appellee reacted to the appellant's letter by filing this action, asking for declaratory judgment that the Act as interpreted and applied by the appellant was unconstitutional, and seeking injunctive relief against its enforcement as ordered by the appellant.

Following the preparation and filing of a Stipulation of Facts and the parties' briefs, the case was argued before a three-judge district court on November 15, 1968.

On January 29, 1969, the lower court filed an opinion ruling in the appellee's favor, but the ground of the ruling was unclear. The appellant filed a Motion for Rehearing and/or Clarification, and on March 10, 1969, the court filed a new decision granting the judgment from which this appeal is taken. In its second opinion, the court stated that it could find no clear basis nor authority in the statute for the appellee's order that cantaloupes not be shipped outside the state in bulk, and that in any event the order constituted an unconstitutional burden on interstate commerce.

The Notice of Appeal was filed May 2, 1969. This Court noted probable jurisdiction on October 13, 1969.

SUMMARY OF ARGUMENT

There are two separate and independent reasons why enforcement of Arizona's Fruit and Vegetable Standardization Act by re-

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[5] The content of the letter, other than formal parts, is as follows:

March 22, 1968

Various Shippers
Gentlemen:

This is to advise that no fruits and vegetables grown in the State of Arizona, that come within the meaning of the Fruit-Vegetable Standardization and Citrus Fruit Standardization laws, will be allowed to leave the State of Arizona unless they meet all the requirements as set forth in these respective laws.

Very truly yours,
L. J. Pike
Supervisor of Inspection

Defendant's Exhibit 4 to Pike Deposition.

quiring inspection of Arizona cantaloupes by Arizona inspectors in the pack does not violate the commerce clause of the United States Constitution.

The first of these is that under the decision of this Court in *Federal Compress and Warehouse Co. v. McLean*, 291 U.S. 17 (1934); *Chassaniol v. City of Greenwood, Miss.*, 291 U.S. 584 (1934); and *Parker v. Brown*, 317 U.S. 341 (1943), state regulation which is enforced solely at the packing stage is "imposed before any operation of interstate commerce occurs." *Parker v. Brown*, 317 U.S. at 361.

McLean, Chassaniol and *Parker* held that for purposes of determining the constitutionality of state regulation of goods which move in interstate commerce, the strictures of the commerce clause come into play only where the regulation is imposed at a point in time *after* the interstate journey has begun. One aspect of the challenged regulation in *McLean* and *Chassaniol*, for example,—compression of the cotton—occurred only after shipping orders for the cotton had been received, but prior to actual shipment of the cotton. Thus, the goods were already destined for interstate shipment at the time the regulation at issue was imposed, and the beginning of the interstate journey was imminent. The compression itself was the only remaining step prior to interstate shipment.

Moreover, even if the fact that the inspection here involved occurs prior to interstate shipment could be ignored, such inspection does not impose an unconstitutional burden on interstate commerce. The scope of the judicial inquiry in cases this kind is as follows:

> In the absence of [congressional] legislation the judicial function, under the commerce clause, Const. art. 1, § 8, cl. 3, as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190 (1938).

Of particular significance to the instant case is the century-old principle of *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 298 (1851), that a distinction must be drawn between regulatory subjects which permit diversity of regulation as among the various states and those which require uniformity. Standardization of fruits and vegetables grown within a particular state clearly falls within the category which permits different states to adopt different policies. Standardization laws have their first and final impact within the regulating state. Unlike the train length requirements in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), or the mudguard requirements in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), standardization laws do not result in a delay of the interstate journey because of differences between the laws of the various states. Following the *Cooley* distinction, therefore, they are a clear example of legislation which permits diversity.

Fruit and vegetable standardization laws differ from the usual exercise of state powers in that these laws regulate quality, uniformity of size, color and variety of products going *out* of the state rather than those coming *into* the state. The legitimacy of a state's interest in regulating the quality of its agricultural products shipped in interstate commerce has already been resolved by this Court. In *Sligh v. Kirkwood*, 237 U.S. 52 (1915), this Court upheld — against an attack on commerce clause grounds — a Florida statute prohibiting shipment of citrus fruits which were immature or otherwise unfit for human consumption.

The legitimacy of requiring standard containers is established by *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935), in which this Court considered and rejected a commerce clause challenge to the constitutionality of Oregon's laws requiring standard containers for fruits and vegetables.

The appellee's persistent atempts to fit this case within the prototype controlled by such authorities as *Baldwin v. Seelig*, 294 U.S. 511 (1935); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Toomer v. Witsell*, 334 U.S. 385 (1948);

and *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), are grounded on an erroneous and impermissible premise. The purpose of Arizona's Fruit and Vegetable Standardization Act was not to preserve the packing business for the State of Arizona, nor to insulate this State from competition of sister states. The undisputed evidence in the record and the legislative history of the Act bear out its purpose, the same purpose as approved by this Court in *Sligh v. Kirkwood*. Economic considerations underlie the Act, but they are not the anticompetitive considerations that were involved in the *Baldwin v. Seelig* line of cases. The economic goal of all standardization acts is to enhance the return to the state's growers by upgrading the reputation of the state's produce as a whole. The undisputed evidence in the record reveals that such was also the purpose of Arizona's Standardization Act. Moreover, this Court has made it very clear that Federal courts will not engage in a fruitless inquiry into the motives of state legislation where the legislature has acted within its province.

The lower court's statement that "a reading of the Act at issue reveals no clear basis nor authority for the issuance of the order" that cantaloupes not be shipped out of the State in bulk is plainly refuted by many provisions of the statute, among them that which prescribes that "all cantaloupes shall be packed in . . . closed standard containers approved by the supervisor. . . ." A.R.S. § 3-503 C.

The announced intention of the appellee to pack its Arizona grown cantaloupes in California — a state which also has a Standardization Act — does not make the Arizona Act unconstitutional. From the legitimacy of Arizona's interest in prescribing standards of quality and pack for Arizona grown produce, it follows inexorably that Arizona has the right to enforce those standards through its own inspectors. Moreover, the standards of the Arizona and California Acts are not the same.

ARGUMENT

I

The Packing of Fruits and Vegetables Does Not Involve "Interstate Commerce" in the Present Context.

It is important to note at the outset that under the decisions of this Court, "interstate commerce" means different things in different contexts.

For example, no one would question that Congress could, under its commerce clause powers, subject the packing of fruits and vegetables for shipment in interstate commerce to wage-and-hour, safety, or other regulation.[6] Indeed, Congress could, if it so elected, enact under its commerce clause powers the same type of regulation involved in this case. It does not follow, however, that State regulation of the packing of fruits and vegetables — in the absence of congressional legislation — is regulation which can be called into constitutional question on the ground that "interstate commerce" is involved. Indeed, the relevant authorities hold that state regulation imposed at the various stages of preparation of agricultural products for shipment in interstate commerce, prior to the time that these products actually move in interstate commerce, is not subject to constitutional scrutiny. We proceed to a discussion of those cases.

Federal Compress and Warehouse Co. v. McLean, 291 U.S. 17 (1934), upheld the constitutionality of a tax imposed by the State of Mississippi upon a cotton warehouse and compress business located within that State. According to stipulated facts, cotton was purchased within Mississippi for resale or to fulfill contracts for sale outside of Mississippi. After the cotton was purchased and ginned, it was transported to the appellant's warehouse for storage,

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[6] The appellee in the Motion to Dismiss, for example, emphasizes the fact that the National Labor Relations Board has jurisdiction over the packing process. The obvious difference is that the jurisdiction of the Labor Board is based upon affirmative congressional action. The principle of *McLean, Chassaniol* and *Parker v. Brown* applies in those instances where Congress has not acted.

whereupon negotiable warehouse receipts were issued to the owners of the cotton.

The sequence of events occurring after the cotton was stored in the warehouse is of great significance for purposes of the present issue. After the holders of the warehouse receipts had given orders to the warehouse company to ship the cotton, the cotton was compressed. The compression process was a process which occurred only after shipping orders had been received, the purpose of compression being to prepare the cotton for shipment. All except a negligible part of the cotton was shipped to points outside the state. In the language of the Court:

> Upon shipping orders given by the holders of the warehouse receipts, appellant compresses the cotton into bales of standard weight and size, suitable for shipment, and delivers them to the rail carrier for interstate transportation. 291 U.S. at 20.

The appellants argued that the tax upon the business both of warehousing and of compressing the cotton was a forbidden burden upon interstate commerce. In rejecting that contention, this Court held that of the overall continuum of events which eventually culminated in interstate sale, the compression and warehousing stages did not involve interstate commerce so as to bring into play the question of the constitutionality of the state regulation. The Court's opinion states as follows:

> A nondiscriminatory tax upon the business of storing and compressing the cotton, which is not itself the subject of a movement in interstate commerce, is not forbidden. *Most articles, before their shipment in interstate commerce, have had work done upon them which adapts them to the needs of commerce and prepares them for safe and convenient transportation, but that fact has never been thought to immunize from local taxation either the articles themselves or those who have manufactured or otherwise prepared them for interstate transportation.* (Citing cases) Here the privilege taxed is exercised before interstate commerce begins; hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. See Nashville, Chattanooga & St. Louis Railway Co. v. Wallace, 288 U. S. 249, 53 S.Ct. 345, 77

L. Ed. 730. The case, therefore, stands on a footing different from those in which local regulations of the business of purchasing a commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239; Lemke v. Farmers' Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458. 291 U.S. at 21-22. (Emphasis added)

The same problem dealt with by Mr. Justice Stone in the *McLean* case was also the subject of a unanimous opinion authored for the Court by Mr. Justice Brandeis one month later in *Chassaniol v. City of Greenwood, Miss.*, 291 U.S. 584 (1934), a case involving the same basic fact situation as *McLean.* The *Chassaniol* opinion states as follows:

> Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in Federal Compress & Warehouse Co. v. McLean; and the rule there declared must govern here. *Ginning cotton, transporting it to Greenwood, and warehousing, buying, and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississipi, a transaction in intrastate commerce.* Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax.
>
> 291 U.S. at 586-587. (Emphasis added)

The fact of central importance in the *McLean* and *Chassaniol* holdings is that the cotton involved in those cases was compressed only *after* shipping orders had been received. Compression was the only function remaining to be performed prior to interstate ship-

ment. Nevertheless, those cases unanimously upheld the tax upon both the warehousing function and also the compressing function. The basis of those decisions was that neither warehousing nor compression was insulated from state regulation by the commerce clause because, "ginning cotton, transporting it to Greenwood, and warehousing, buying, *and compressing it there,* are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce." *Chassaniol v. City of Greenwood,* 291 U.S. at 587. (Emphasis added.) Under these facts this Court held that "the privilege taxed is exercised before interstate commerce begins." *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. at 22.

Whether cantaloupes have a shorter or longer storage period than cotton is therefore immaterial, since the compression involved in *McLean* and *Chassaniol* occurred only after shipping orders had been received. By that time they were already bound for interstate shipment, compression being the only remaining pre-shipment process.

It is respectfully submitted that *Shafer v. Farmers Grain Co.,* 268 U.S. 189 (1925), and *Lemke v. Farmers Grain Co.,* 258 U.S. 50 (1922), are not inconsistent with this Court's holdings in *McLean* and *Chassaniol.* The regulation in *Shafer* and *Lemke* occurred at a time when there was no pre-shipment processing to be performed. This Court in *Parker v. Brown* distinguished *Lemke* and *Shafer* from *Chassaniol* on that basis:

> The Court [in Lemke and Shafer] was of opinion that the purchase of the wheat for shipment out of the state *without resale or processing* was a part of the interstate commerce. Compare Chassaniol v. Greenwood, supra. *Parker v Brown,* 317 U.S. at 361-362. (Emphasis added.)

However, if there is any inconsistency between *Lemke* and *Shafer,* on the one hand, and *McLean, Chassaniol,* and *Parker v. Brown,* on the other, the latter must prevail since they were later in time.

In the instant case, as in *McLean* and *Chassaniol*, the regulation has its first and final impact at a processing stage prior to shipment. It follows that in the absence of any contravening Federal statute — and there is none in this case — the State of Arizona is free to implement the regulation of its fruits and vegetables at the packing stage free from commerce clause strictures.

The appellee's contention in the Motion to Dismiss that the regulation here at issue prevents interstate movement itself, rests upon bootstrap logic. The interstate movement to which the appellee refers is necessarily that of the cantaloupes which do not meet the quality and packing standards of the Act. Such cantaloupes are prevented from moving in interstate commerce solely because of the fact that they do not meet the necessary standards, and the appellee presumes the completion of the shipment of such produce as a predicate to its contention that Arizona is preventing interstate movement. If carried out according to its intent, Arizona's standardization program will intercept substandard produce before it ever leaves the State. Under *McLean*, *Chassaniol*, and *Parker v. Brown*, such regulation occurs prior to the beginning of the interstate journey and is not subject to commerce clause invalidation.

II

The Burden on Interstate Commerce, If Any, Is Not Unreasonable

The dispute in this case fits a familiar pattern; a program adopted by a State Legislature pursuant to a legitimate state objective is objected to by one of the regulated corporations on the asserted ground that the program has an ancillary impeding effect to one degree or another on the flow of commerce across state lines.

It does not suffice — even if it were true — for the appellee simply to assert that Arizona's standardization laws constitute an impediment to interstate commerce because the fruits and

vegetables ultimately move in interstate commerce. It is beyond dispute that Congress could, if it elected to do so, enact a statute prohibiting Arizona or any other state from requiring fruits and vegetables shipped outside the state to meet certain standards. The fact is that Congress has not done so. The broad discretion vested in the states in the absence of prohibiting or inconsistent Federal legislation has been summarized by this Court as follows:

> Ever since Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L.Ed. 412, and Cooley v. Board of Port Wardens, 12 How. 299, 13 L.Ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character, and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 (1938).

The enacting Legislature declared the purpose of Arizona's Fruit and Vegetable Standardization Act to be as follows:

> To promote the development of the Arizona fruit and vegetable industry, to prevent fraud and deception in the receiving, packing, marking, shipping, consignment, sale, and accounting of sales of fruits and vegetables for interstate and foreign commerce, there are hereby established certain standards and certain standard containers for various fruits and vegetables. . . . 1929 Session Laws of Arizona, Chap. 95, Sec. 2, p. 307.

With regard to cantaloupes, the architects of Arizona's Fruit and Vegetable Standardization Act have made certain fundamental policy determinations. Among these determinations are the following:

(1) Of the various quality defects proscribed by A.R.S. § 3-503 A, "not more than ten per cent, by count, of the cantaloupes ***in any one container*** may be below the [specified] requirements, but not to exceed one-half of this tolerance shall be allowed for any one cause." A.R.S. § 3-503 A (Emphasis added).

(2) "Cantaloupes *packed in the standard containers* shall be fairly uniform in size." *Ibid.* (Emphasis added.)

(3) "All cantaloupes *in each container* shall be of one variety or of similar varietal characteristics." *Ibid.* (Emphasis added).

(4) Containers of cantaloupes must disclose in plain sight and in plain letters the name and the address of the packer. A.R.S. § 3-503 C. An obvious purpose of this requirement is to assure that Arizona produce packed under the standards of the Arizona Act will be identified as Arizona produce.

(5) "All cantaloupes shall be packed in regular compact arrangement *in closed standard containers approved by the supervisor. . . .*" *Ibid.* (Emphasis added.)

(6) No container of cantaloupes may be so arranged as to constitute a deceptive pack, that is so that the outer layers are "so superior in quality, size or condition" to the unexposed cantaloupes as to "materially misrepresent the entire content." A.R.S. §§ 3-481 8, and 3-522 B 2.

Enforcement of every one of the foregoing provisions of the Act would be impossible unless the inspector can inspect the cantaloupes in the pack. If the appellee is permitted to ship its cantaloupes in bulk into the State of California, the appellant would be powerless to require that the cantaloupes be identified as Arizona cantaloupes.[7] Similarly, unless they can inspect the cantaloupes in the pack, there is no way that the Arizona inspectors can determine whether cantaloupes packed in each standard container are uniform in size, color or variety, whether the higher quality fruit has been placed in the exposed portion of the container so as to materially misrepresent the content of the entire carton; or whether they have been packed in regular compact arrangement in closed standard containers approved by the supervisor.

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[7] In fact, they would not be identified as Arizona cantaloupes, but would bear the name and address of their California packer. California Agricultural Code, Section 45691.

The lower court, therefore, clearly erred in stating that "a reading of the Act reveals no clear basis nor authority for the issuance of the order by the defendant. . . ." Appendix 62.

Even as to quality, *e.g.*, the requirement that the cantaloupes must be "mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting or other causes" the inspector has no way of knowing which cantaloupes the shipper proposes to pack and sell until the shipper has sorted the culls from the good fruit.

At all turns, therefore, inspection of the pack is indispensable to carrying out the purposes of the Standardization Act. It is immaterial to the appellant when or where the cantaloupes are packed as long as the supervisor can insure that the Arizona Standardization Act is complied with.

The necessity of a packing shed comes into the picture, not because of any requirement of the appellant or of State law, but solely because of the fact that cantaloupes, unlike certain other fruits and vegetables, can be sorted and packed only in a packing shed, according to the appellee's agent. Gipe Deposition, 10/8-13. It is immaterial to the appellant whether the appellee packs its cantaloupes in or out of a packing shed. The appellant's sole concern is that they must be packed in "closed standard containers approved by the supervisor," and that other standards prescribed by the Act must also be met.

The appellee's persistent contention that the appellant is attempting to force it to construct a packing shed in the State of Arizona is, therefore, without merit. The appellant is merely enforcing the requirement that the fruit be packed in standard containers according to the prescribed standards. The necessity of a packing shed does not rest upon the appellant's order, but rather on the inability of the appellee to sort and pack except in a packing shed.

The appellee's statement in its Motion to Dismiss that "appellant is already carrying out inspections in the field . . ." (Motion to Dismiss, p. 36) is misleading. The sole inspection which is carried out in the field is a pickleworm inspection. Appendix 38. It is not an inspection for the purpose of determining compliance with requirements of the Standardization Act; for reasons set forth above, such an inspection in the field is impossible. The sole purpose of the inspection in the field is to determine the presence or absence of pickleworm.

We turn now to a discussion of the decisions of this Court which are relevant to the present problem.

(A) Relevant Authorities and General Principles Established by Those Authorities.

In the absence of contradicting Congressional legislation, the principles governing commerce clause constitutionality of State regulations are basically two. They are:

(1) A distinction is to be drawn between state programs which, by their nature, demand uniformity and those which permit diversity among the different states.

(2) The states are to be given a broad leeway in effectuating the purposes of legitimate state goals. If the challenged program falls within the sphere of state governmental powers, and if the state could reasonably conclude that the program would contribute toward achievement of the state objective, then its constitutionality must be upheld.

The foregoing principles are illustrated by *Cooley v. Board of Wardens of the Port of Philadelphia,* 12 How. 298 (1851), and *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938).

Involved in *Cooley* was the constitutionality of a state law requiring pilots for certain types of vessels, and setting qualification standards for such pilots. This Court determined that regulation of the qualifications of pilots constitutes a regulation of navigation and therefore a regulation of commerce. Nevertheless, the

Court held the regulation constitutional, on the basis of the following landmark principle:

> Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. 12 How. at 319.

In *Barnwell,* this Court upheld the constitutionality of a South Carolina statute prohibiting trucks and semi-trailer trucks over 90 inches in width and whose total loaded weight exceeded 20,000 pounds from using the State highways. This Court's holding is especially significant in light of the unchallenged findings of the three judge district court which had held the statute unconstitutional.

The trial court found that ". . . there is a large amount of motortruck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced. . . ." 303 U.S. at 182. It also found that ". . . from 85 to 90 per cent of the motortrucks used in interstate transportation are 96 inches wide and of a gross weight, when loaded, of more than 10 tons; that only four other states prescribe a gross loaded weight as low as 20,000 pounds; and that the American Association of State Highway Officials and the National Conference on Street and Highway Safety in the Department of Commerce have recommended for adoption weight and width limitations in which weight is limited to axle loads of 16,000 to 18,000 pounds and width is limited to 96 inches." 303 U.S. at 182-183. The trial court ". . . found in detail that compliance with the weight and width limitations demanded by the South Carolina Act would seriously impede motortruck traffic passing to and through the state and increase its costs; . . ." 303 U.S. at 183, and that most of the state highways were capable of handling the wider and heavier traffic. The district court

also found that ". . . the gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but that the appropriate factor to be considered is wheel or axle weight . . ." *Ibid.*

Finally, the district court exempted from its injunction decree the operation of trucks on highways "not constructed with sufficient strength to support the heavy trucks or modern traffic or too narow to accommodate such traffic safely." 303 U.S. at 182.

This Court reversed the district court's holding that the statute was unconstitutional. Significantly, this Court did not reject any of the findings set forth above. Rather it overturned the lower court's ruling pertaining to restrictions imposed upon state regulations by the commerce clause. The test, as laid down by Mr. Justice Stone in a unanimous opinion for the Court is as follows:

> Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. *In the absence of such legislation the judicial function, under the commerce clause, Const. art. 1, § 8, cl. 3, as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.* Sproles v. Binford, supra; Stephenson v. Binford, 287 U.S. 251, 272, 53 S. Ct. 181, 187, 77 L.Ed. 288, 87 A.L.R. 721. 303 U.S. at 189-190. (Emphasis added.)

* * * * *

Since the adoption of one weight or width regulation, rather than another, is a legislative, not a judicial, choice, its constitutionality is not to be determined by weighing in the judicial

scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. Cf.Worcester County Trust Co. v. Riley, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268. *Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility.* Hence, in reviewing the present determination, we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record *whether it is possible to say that the legislative choice is without rational basis.* Standard Oil Co. v. Marysville, supra; Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 263, 56 S.Ct. 453, 456, 80 L.Ed. 669; Id., D.C., 11 F. Supp. 599, 600.

303 U.S. at 191-192. (Emphasis added.)

Cases in which state schemes have been invalidated on commerce clause grounds are further illustrative of the great latitude allowed to the states in implementing their police power programs. *Southern Pacific Company v. Arizona,* 325 U.S. 761 (1945), invalidated Arizona's Train Limit Law, limiting passenger trains to fourteen cars and freight trains to seventy cars. At the time of the decision, approximately 93% of the freight traffic and 95% of the passenger train traffic in Arizona was interstate. The Train Limit Law required the Southern Pacific Company to operate over 30% more trains in Arizona than would otherwise have been necessary, the additional costs amounting to about $1 million a year. The effect of the law was frequently to control traffic all the way from Los Angeles to El Paso because of the unfeasibility of changing trains at the State lines. The additional cost, however, was not the controlling factor. The trial court had concluded that "the train length limitation increased rather than diminished the number of accidents." 325 U.S. at 778. This Court agreed with the trial court, observing that as a safety measure the Arizona law "affords at most, slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and train operations. . . ." 325 U.S. at 779.

Similarly, in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), this Court held unconstitutional a unique Illinois statute requiring the use of a contoured mudguard on trucks and trailers. The statute was held unconstitutional only because of the massive showing of burden on interstate commerce which was made, and because the Court concluded that the contoured flaps did not represent an improvement, but rather a step backward from the safety standpoint. The burden on interstate commerce was exceptionally severe because of the difficulty of changing over to comply with the requirements of different states. Arkansas, for example, required the standard mud flaps, and there was a significant amount of truck traffic between Arkansas and Illinois. The problem was further compounded by "interline operations" which involved loaded trailers originating in one state being transferred to the tractors of another line.

Thus, in both *Bibb* and *Southern Pacific*, the Court concluded in effect that the state statute either did not achieve its intended purpose or actually represented a step backward. Even in those cases, however, the Court was very careful to accentuate the heavy presumption in favor of the constitutionality of the state statute. In the language of *Bibb:*

> These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. Unless we can conclude on the whole record that "the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it" (Southern Pacific Co. v. State of Arizona, supra, 325 U.S. at pages 775-776) we must uphold the statute. 359 U.S. at page 524.

There is a further suggestion in the majority opinion in *Southern Pacific* that the fact that interstate railroads were involved

may have affected that decision. *Barnwell* was distinguished as follows:

> *South Carolina State Highway Dept. v. Barnwell Bros., supra,* was concerned with the power of the state to regulate the weight and width of motor cars passing interstate over its highways, a legislative field over which the state has a far more extensive control than over interstate railroads. 325 U.S. at 783.

The foregoing distinction is consistent with the basic rule laid down by *Cooley* that some matters by nature demand uniformity, whereas others permit diversity. Highways maintained by the state — the Court appears to have reasoned in *Southern Pacific* — do not so "imperatively demand a single uniform rule" as do interstate railroads. The setting of standards for produce which is shipped out of the state would seem to permit diversity even more than regulations dealing with either highways or railroads. Various factors, such as the types and times of harvest, the economic conditions of the area, the climate, the types of local insects and diseases, the susceptibility of the produce to deterioration in shipment, and numerous other variables make diversity of regulation not only permissible but preferable. Standardization by its very nature is better implemented by permitting individual states to enact and carry out those rules and procedures which are best adapted to their particularized situation.

From a functional standpoint, the issue of uniformity versus diversity requires an inquiry into whether there is any adverse impact upon interstate commerce resulting from the fact that different states may enact different laws pertaining to fruit and vegetable standardization. Unlike the mud guard requirements in *Bibb,* the weight and width restrictions in *Barnwell,* and the train length limitations in *Southern Pacific,* the *differences* between the instant law and the laws of sister states are not themselves impediments to commerce. In *Bibb, Barnwell* and *Southern Pacific,* interstate shippers found themselves obligated, upon entering the state at issue, to go to great expense and trouble solely

because of the differences in state laws. Interstate truckers, for example, upon entering the State of Illinois prior to the *Bibb* case, had to install new mud guards. In *Barnwell,* interstate truckers, upon reaching the South Carolina state line, found themselves obligated either to reload their cargo onto other trailers or go around the State of South Carolina. And in *Southern Pacific,* interstate railroads had to shorten the size of their passenger and freight trains at El Paso and Los Angeles because of the *differences* between the Arizona law and the laws of its sister states.

The Arizona Fruit and Vegetable Standardization Act, by contrast, has its first and final impact on goods which originate within this State before they ever enter any other state. Once these goods cross a state line, there is no further impediment to their interstate journey because of any differences in standardization laws.

The instant case is therefore the clearest possible example of a case which falls on the permissible side of the *Cooley* dividing line: There is no adverse impact whatever upon interstate commerce as a result of *differences* between Arizona's standardization laws and the standardization laws of other states. By the time Arizona fruits and vegetables become a part of the flow of interstate commerce, they do so completely free from any regulation under the Act at issue.

The appellee will doubtless contend, as it has contended throughout these proceedings, that this case is not governed by the principles of *Cooley, Barnwell,* and others, because it is not a safety regulation, and that it affects only produce going out of the state rather than coming into the state. This argument is foreclosed by this Court's holdings in *Sligh v. Kirkwood,* 237 U.S. 52 (1915), and *Pacific States Box & Basket Co. v. White,* 296 U.S. 176 (1935).

Sligh v. Kirkwood, 237 U.S. 52 (1915), upheld the constitutionality of a Florida statute making it unlawful for anyone to

sell, offer for sale, ship or deliver for shipment, any citrus fruits which were immature or otherwise unfit for human consumption. In dealing with the issue of the scope of state police powers, the Court quoted from *Eubank v. Richmond,* 226 U.S. 137 (1912), "It [the state police power] extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity." 226 U.S. at 142.

It was contended in the *Sligh* case — as the appellee has contended in this case — that the regulation of fruits which were destined for sale in states other than the State of Florida was not a legitimate concern of the State of Florida and not properly within its police powers. This Court's opinion refuting that contention states as follows:

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. *The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.* 237 U.S. at 61-62. (Emphasis added)

We submit that the foregoing language from the *Sligh* opinion, and the holding of that case, are completely dispositive of the same issues in the instant case. If Florida, in 1915 — in the interest of maintaining the reputation of its citrus industry as a whole — can prevent the shipment of immature citrus fruits in interstate commerce, then Arizona, in 1968, can surely prescribe standards of quality, appearance, packing and marketability for cantaloupes to be shipped in interstate commerce, and can prevent

any cantaloupes from leaving this State which do not comply with those standards. The objective of the two Acts is precisely the same, and both fall within the area of state competence to regulate.

Involved in the *Pacific States Box & Basket Co.* case was an Oregon statute entitled "Standard Containers for Fruits and Vegetables." That statute vested in the State Director of Agriculture the power "to fix and promulgate official standards for containers of horticultural products, 'in order to promote, protect, further and develop the horticultural interests' of the state. 296 U.S. at 178. The statute further provided that after a standard container had been prescribed, it was unlawful for anyone "to pack for sale or transport for sale, or sell, the article in a container unless it conforms to the standard." 296 U.S. at 179. The order at issue in that case prescribed that strawberries and raspberries be packed only in certain containers known as "hallocks." The plaintiff manufactured a type of container other than a hallock, and challenged the constitutionality of the statute on commerce clause and other grounds. This Court, in a unanimous opinion written by Mr. Justice Brandeis, upheld the constitutionality of the statute. The following quotations taken from Mr. Justice Brandeis' opinion clearly establish the legitimacy of state standardization acts:

> The power of a state to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition, is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See Turner v. Maryland, 107 U.S. 38, 51-54. Latterly, with the broadening of the field of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended. 296 U.S. at 181.
>
> * * * * *
>
> Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether

> that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the Constitution of the state permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may inquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted. *Id.* at 182.

The propriety of Arizona's interest in prescribing standards of quality and pack for Arizona produce is therefore clear. Moreover, the other factor to be taken into consideration — asserted burden on interstate commerce — is, upon analysis, either very slight or non-existent.

The most that the appellee has ever contended is that compliance with the requirement that cantaloupes be shipped only in closed standard containers approved by the supervisor will impose upon it an additional cost: the cost of constructing or otherwise acquiring the use of a packing shed.

Where, as here, the sole consequence of enforcement of a state statute will be that a profit-making corporation is put to greater expense, this expense alone is never sufficient to invalidate the statute. In *Bibb v. Navajo Freight Lines, Inc.*, for example, the Court said:

> These findings on costs and on safety are not the end of our problem. Local regulation of the weight of trucks using the highways upheld in Sproles v. Binford, supra, also involved increased financial burdens for interstate carriers. 359 U.S. at 525.

The appellee has also contended that application of the Act prevents consolidation of certain packing functions, but at most this argument is only a contention that additional costs may be involved.

The appellee has confused the issue of burden on interstate commerce with an asserted burden on a profit-making corpora-

tion. There is no suggestion, nor could there be, that Bruce Church, Inc. will discontinue its Parker operations if it is required to conform to the provisions of the Standardization Act. There are at the present time in the Parker area two companies, the Garin Company and the Tri-Produce Company, which grow and harvest cantaloupe acreages comparable in size and quality to those of the appellee. Both of these companies have operations in California as well as Arizona, and both pack their cantaloupes subject to inspection and supervision by Arizona standardization officers. See Appendix, 34-35. If it is feasible for these companies to pack their Arizona-grown produce subject to the requirements of the Arizona Standardization Act, it will also be feasible for the appellee to do so. Therefore, the sole burden will be a burden on the appellee, and not on interstate commerce; all of the produce which meets the standards of the Act will be shipped to whatever points the appellee desires to ship it.

Even if additional cost to the regulated corporation were relevant, the economic impact to the appellee is minimal. At most, the plaintiff will have to spend $200,000.00 to build a packing shed. This is only about 1/17th of the capital expenditure which the plaintiff has already made at its Parker operation; less than 1/3rd the value of one single crop — cantaloupes — for one single year at Parker; and only 2/3rds of the *net profit* anticipated by the appellee from one cantaloupe crop for one year. See Appendix, 31-33, and Gipe Deposition, page 47.

Moreover, it is not as though enforcement of the standardization law would result in a net cost to Bruce Church, Inc. in the amount of $200,000.00. The packing shed facilities which the appellee has been using in Blythe, California, are leased facilities, and the lease expired in November of 1968. Appendix 47. The company's long-range plans, in any event, call for the construction of a packing shed, and the company has not yet decided whether it should be built in Arizona or California. Gipe Deposition, 54/9-55/5.

(B) Irrelevance of Baldwin v. Seelig Line of Cases.

The apparent root error underlying the lower court's holding was its assumption, shared by the appellee, that the instant case is governed not by *Sligh v. Kirkwood, Pacific States Box & Basket Co.,* and other cases which have dealt with the power of a state to prescribe standards of quality and pack for its produce, but by those cases which stand for the proposition that no state can wall itself off from competition from other states. *Baldwin v. Seelig,* 294 U.S. 511 (1935); *Toomer v. Witsell,* 334 U.S. 385 (1948); and *Johnson v. Haydel,* 278 U.S. 16 (1928).

The *Baldwin v. Seelig* line of cases clearly establishes that a state cannot, consistent with the commerce clause, isolate itself as an economic unit, preserving for itself any segment of business which arises within its borders. Were such the purpose of the Arizona Standardization Act, it would clearly be invalid. On the other hand, *Sligh v. Kirkwood* and *Pacific States Box & Basket Co.* establish with equal clarity that a state may set standards of quality and pack for produce grown and shipped from the state, in the interest of maintaining the long-range reputation of that produce.

The issue, then, is whether this Court will accept as the purpose of the statute that which was expressed by the enacting legislature in 1929, and has never been questioned since that time, and that which the parties to this action have stipulated; or whether this Court will ascribe to the Act an improper purpose which has foundation neither in the record in this case, nor in the history of the Act itself.

This is simply not a *Baldwin v. Seelig* type case. The legislature which enacted the Act at issue clearly declared that the purpose is:

> To promote the development of the Arizona fruit and vegetable industry in interstate and foreign markets; to establish standards and standard containers for certain fruits and vegetables; to prevent fraud and deception in the receiving, packing, marking; sale and accounting of sales of fruits and vege-

tables. . . ." Preamble to Chapter 95, HB 97, 8th Legislature, State of Arizona (1929), cited in 1929 Session Laws of Arizona, Chap. 95, p. 306.

The undisputed testimony on the record in this case concerning the purpose of the statute comes from two highly qualified sources. The parties have stipulated that one of the co-authors of the Act, Mr. O. D. Miller, if called to testify, would testify that the purposes of the Act were to promote and develop Arizona fruit and vegetables in interstate and foreign commerce and to enhance the return to producers of fruits and vegetables within this state. Appendix 27-28. The testimony of the appellant himself, Mr. L. J. Pike, is to the same effect. See Pike Deposition, pp. 10 and 11. In addition, the parties have stipulated that a primary purpose of the Standardization Act of Arizona and California was to prevent deceptive packs. Appendix 42-43.

By contrast, there is not one scintilla of evidence that the purpose of the Act was to preserve the packing business for Arizona. Nor could there be. The Act has been in existence for over 40 years. Its provisions extend not only to cantaloupes, but to a total of 37 agricultural products. The Act draws no distinction between those products which are packed in a packing shed and those which are not. The reason is readily apparent: the Act is totally unconcerned with the place where the produce is packed. The sole concern of the Act in this regard is that where standard containers are prescribed, the inspectors must be able to verify that standard containers have been used and that other statutory standards — uniformity of color and variety, non-deceptive packs, etc. — have been met.

There is therefore ample evidence that the underlying purpose of Arizona's Fruit and Vegetable Standardization Act is a proper one. There is absolutely no evidence to support the improper purpose which the appellee would have this Court ascribe to the Act. Moreover, it is well-settled that courts will not ascribe to legislation an improper, invalidating purpose in place of a proper purpose on which the legislature could reasonably have relied.

It is only where the stated, legitimate purpose is not a reasonable one, or is precluded by the proven facts, that courts will hold that the purpose was an improper one. As this Court held in *South Carolina v. Barnwell Bros.*:

> Being a legislative judgment it is presumed to be supported by facts known to the Lgeislature *unless facts judicially known or proved preclude that possibility.* 303 U.S. at 191. (Emphasis added.)

Similarly, just last term in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R. Co.,* 393 U.S. 129 (1968), this Court reversed a decision of the district court invalidating Arkansas' full crew laws, which specify minimum numbers of employees who must serve on train crews. The district court had held that the financial burden of compliance was "out of all proportion to the benefit, if any derived . . ." from enforcing the statute. This Court held as follows:

> We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause." 393 U.S. at 136.

The district court in the instant case has also "indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause." Although it is impossible to determine from the lower court's cryptic opinion the basis for its constitutional holding, it can be inferred from the court's citation of *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928), that the court agreed with the appellee concerning the purpose of the Standardization Act.

In *Haydel,* this Court declared unconstitutional a Louisiana statute prohibiting shipment out of the State of any shrimp from which the heads and hulls had not been removed. Louisiana contended that the purpose of the requirement was to preserve the hulls and heads for Louisiana use. There simply was no basis for this contention. This Court observed that "not more than half the hulls and heads removed in Louisiana is used for any

purpose. They have no market value, cannot be sold or given away, and often constitute a nuisance." 278 U.S. at 9. Under these circumstances, the only reasonable conclusion was that which the Court drew: "the conservation of hulls and heads is a feigned and not the real purpose." *Id.*, at 10.

Thus, the *Haydel* case came within the exception to the *Barnwell* rule: legislative judgments are "presumed to be supported by facts known to the legislature ***unless facts judicially known or proved preclude that possibility.***" 303 U.S. at 191. (Emphasis added.)

Subsequent decisions in which litigants have relied upon *Haydel* have made it very clear that that case has no applicability where the court can reasonably find a proper purpose for the statute at issue. For example, in ***Bayside Fish Flour Co. v. Gentry,*** 297 U.S. 422 (1936), this Court upheld a California statute requiring licenses for plants engaging in the processing of fish. The opinion observes that "Appellant places great reliance upon Foster Packing Co. v. Haydel. . . ." 279 U.S. at 426. In holding *Haydel* inapplicable, the Court stated as follows:

> If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts. *Ibid.*

The controlling fact in *Haydel* was the complete absence of any legitimate objective upon which the state regulation could be based. This Court therefore concluded that the real purpose was to immunize the Louisiana shrimp packing business from out-

of-state competition.[8] In the instant case the true objective of the statute — as revealed by the statutory history and the uncontradicted evidence in this case — is a legitimate objective. Any effect on interstate commerce is "purely incidental, indirect and beyond the purposes of the legislation." *Ibid.* It follows that the holdings in *Haydel* and similar cases are inapplicable.

(C) Irrelevance of Past Lapses in Enforcement of the Act.

The 1965 amendment of the Act prescribed that cantaloupes must be packed in standard containers approved by the supervisor. Since that time, over a period of three shipping seasons, 1965-1967, the appellant allowed a total of 1084 acres of cantaloupes to be shipped out of the State in bulk in violation of the Act. Appendix, 51. These violations should never have been allowed, and the appellant acknowledges that had he been properly advised, they would not have been allowed. In any event, whatever significance these past instances of failure to enforce the Act may hold for Arizona state officials and Arizona producers, they are totally irrelevant to the question of the continuing validity of the Act itself.

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[8] Unlike the situation in the Haydel case, there is in fact no separate packing industry which packs cantaloupes in the State of Arizona. The packing is done by the shippers themselves. There is, however, a local industry within the State of Arizona, which is very much concerned over the lower court's holding. Both before the lower court, and also before this Court, counsel for the Arizona Vegetable Growers Association (an industry association consisting of most of the vegetable and melon growers in Arizona) has been associated with the State Attorney General's office, at the expense of the Arizona Vegetable Growers Association, to defend the constitutionality and enforceability of the Fruit and Vegetable Standardization Act. The members of this Association are in the business of producing, shipping and marketing Arizona fruits and vegetables. They have seen the great benefits which have come to their industry over the years through the enforcement of minimum uniform standards of quality and pack provided by the Standardization Act, and they realize the great loss which their industry would suffer if these standards were no longer enforced. They fear a return to the situation existing prior to the Standardization Act, in which slipshod packing practices of a few had an adverse impact on the reputation of all Arizona produce.

This Court effectively held as recently as 1967 that the failure to enforce a statute — even where the enforcement failure is total and extends over a period of more than fifty years — does not affect the validity of the statute itself, nor does it lessen the future responsibility of officials charged with enforcement of the statute. *Lassen v. Arizona,* 385 U.S. 458 (1967). Involved in the *Lassen* case were certain provisions of the Arizona Enabling Act which prescribed procedures for the disposition of lands which had been conveyed by the United States to the State of Arizona in trust. The Arizona Supreme Court had held that the lands could be used for highway purposes without the trust being compensated for each parcel so used; that Court's opinion observed that the practice of using trust lands in this manner was of over fifty years' standing. *State v. Lassen,* 99 Ariz. 161, 407 P.2d 747 (1965). Before this Court, the respondent urged the significance of the fact that there had been a total failure to enforce, extending over a period of more than a half century. (See Respondent's Brief, *Lassen v. Arizona,* No. 84, OT 1966, pp. 17-21). This Court reversed, declaring that the Act required specific compensation for each parcel used for highway purposes. The opinion devoted only a passing footnote reference to the fact that there had been past enforcement failures. *Lassen v. Arizona,* 385 U.S. 458, f.n. 22 (1967).

Whatever significance past enforcement lapses may have for other purposes, they have no relevance to the question of the continuing validity of the Act. Such lapses are not total, as in the *Lassen* case, and they do not extend over nearly so long a period of time; their irrelevance follows *a fortiori* from the holding in *Lassen.* Shipments in violation of the Act have been comparatively small and, with the exception of the appellee, none have been by a major shipper.

(D) Relevant and Irrelevant Aspects of California's Fruit and Vegetable Standardization Act.

Virtually every important agricultural state in the nation, with the exception of Texas, has a standardization act of some kind.

Arizona's Standardization Act was patterned after the California Act, and the provisions of the two Acts are still similar. As discussed below, however, their standards differ in many respects.

The existence of standardization acts in California and other states is relevant because it demonstrates that Arizona is not alone in concluding that uniformity of pack and quality can enhance the reputation and competitive standing of a state's produce.

In the appellee's view, the California Fruit, Nut and Vegetable Standardization Act has another significance. The principal thrust of the appellee's argument before the lower court was that Arizona's interests would be vindicated because of the appellee's announced intention to pack its cantaloupes in California, whose standards — according to the appellee — are as high as or higher than the standards of the Arizona Act. The argument is not well taken for two reasons. First, the standards of the two Acts pertaining to cantaloupes are not the same. Even more important, it would seem elementary that Arizona is entitled to enforce its own law through its own inspectors, rather than being forced to rely upon the enforcement officers of a sister state, over whom it has no control.

(1) *Material Differences in the Two Acts.*

The acts of both states proscribe the shipment of cantaloupes with specified types of physical defects, such as mold, decay, and insect injury which has penetrated or damaged the edible portion of the cantaloupes. Compare A.R.S. § 3-503 A, with § 45601, California Agricultural Code. In addition, both statutes interdict cantaloupes which have been seriously damaged, and both define "serious damage." The term "serious damage," however, embraces a broader range of defects under the Arizona statute than under its California counterpart. The California statute provides that "damage to any one cantaloupe is not serious unless it affects the edible portion of the individual cantaloupe." California Agricultural Code, § 45601. The Arizona definition is broader: "Damage to any one cantaloupe is not serious unless it affects the

edible portion *or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof.*" A.R.S. § 3-503 A. (Emphasis added.)

The Arizona statute's extension of the serious damage proscription to those defects which affect the shipping quality or detract from the appearance of the individual cantaloupe is not surplusage. The parties have stipulated that there is a difference between physical defects, and defects which affect the appearance or shipping quality of produce. Stipulation No. XII, entered into between the parties, reads in part as follows:

> In addition to physical defects, such as softness, sponginess, rot, etc., some individual shippers may give greater emphasis than others to considerations such as *appearance and shipping qualities, which, though they are factors separate and apart from physical defects, affect the marketability of the produce.* Appendix, 36. (Emphasis added.)

(2) *Arizona's Interest in Enforcing Its Own Act.*

An indispensable concomitant to any state's right to enact standardization laws is the corollary right to enforce its laws through its own inspection officers. In this regard, the following considerations are pertinent:

(a) Even if the statutory standards were exactly the same, identical standardization practices would not necessarily result. Both the Arizona and the California laws are couched in quite general terms, such as "free from mold, decay and insect damage," "fairly well netted," "fairly uniform in size," etc. Substantial differences can result from the manner in which the inspection officers of the two states actually enforce these highly generalized standards. The appellant testified at his deposition that the enforcement of statutory standards by one group or another group of inspection officers can result in appreciable differences. Continued Deposition of L. J. Pike, 12/10-16. The parties have stipulated that within the bounds of the requirements of the Arizona and California Acts, some shippers go to greater lengths than others in sorting for color, and uniformity of size, and fol-

lowing similar procedures to ensure the shippers' long-run reputations. Appendix 36. It was further stipulated that:

> The manner in which an individual shipper packs and the manner in which he sorts for color, uniformity of size, and similar factors, has a substantial effect upon the long-run reputation that his produce attains with his buyers; this long-run reputation that the shipper's produce acquires is a matter of prime concern for a shipper such as the Bruce Church Company. This is one of the reasons why the Bruce Church Company would not even want its cantaloupes to be packed by any other company. Appendix 36.

We agree that it is within the province of different shippers to elect — in the interest of maintaining their long-run reputations — to place differing emphases on packing techniques and quality-ensuring procedures, and not to entrust such important matters to anyone else. By a parity of reasoning, it is within the prerogative of each state to enforce the standards of its own standardization laws through its own supervisor and its own inspectors, rather than being forced to rely on the inspection officers of another state over whom it has no control.

(b) The standards of the California fruit and vegetable standardization laws, and the practices and procedures which are followed in implementation thereof, are, of course, subject to change by the Legislature and by enforcement agencies of the State of California, over whom Arizona has no control. A rule which would make the validity of an Arizona law dependent upon its similarity to a California counterpart would subject enforcement of the Arizona law to the obligation to make continuous investigations into the contents of, and changes in, the California statutes, regulations, and enforcement practices. The obligation to conduct such an ongoing, moment-to-moment inquiry into the laws of another state as a precondition to the continuing constitutionality of this State's law is manifestly impractical and unworkable. In addition, it flies in the face of the fundamental principle laid down by *Cooley v. Board of Wardens*, 12 How. 298 (1851), that in those areas in which uniformity is not

required, each state is entitled to adopt its own individualized program.

(c) Arizona law requires that all containers of fruits and vegetables subject to the Act "shall bear in plain sight and in plain letters" the "name of the orchard or farm where the fruit or vegetable was produced." See A.R.S. § 3-499. Such a provision is, of course, in keeping with the general purpose of Arizona's standardization laws. There is no similar requirement in the California statutes. Indeed, crates of Arizona cantaloupes packed in California will bear a California address,[9] and a central object of the standardization laws will have been lost.

The cantaloupes which are at issue in this case provide an excellent example. It has been stipulated that "cantaloupes grown at Parker are considered ordinarily to be of a higher quality than those grown in other districts in Arizona." Appendix 41. It is within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality Parker fruit was grown in Arizona.

In summary, it is within Arizona's constitutional authority to enact a standardization law for fruits and vegetables. It necessarily follows that Arizona has the authority to enforce that law. Enforcement and supervision can be accomplished only within the State of Arizona. It would indeed be a hollow right if Arizona is entitled to enact standardization laws, but must depend for their enforcement upon the enforcement officers of a sister state. The existence or non-existence and similarity or lack of similarity of a standardization law in California are therefore insufficient bases for the contention that Arizona may not enforce its own law through its own inspectors.

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[9] Section 45691 of California's Fruit, Nut & Vegetable Standardization Act provides as follows:

Packer's name and address.

Every container of cantaloupes shall bear upon it in plain sight and in plain letters on one outside end, the name of the person that first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready location of such packer.

CONCLUSION

Almost all states for whom the raising of fruits and vegetables constitutes an important industry have enacted some type of law prescribing minimum standards of quality and pack for produce shipped out of the state.[10] Arizona is one of those states.

The legitimacy of a state's interest in upgrading the quality, saleability, and reputation of the produce which is shipped from the state has been recognized by this Court for more than half

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[10]For examples of standardization acts of other states, see the following:
California—West's Annotated California Codes, Agricultural Code, Division 17.
Colorado—Colorado Revised Statutes (1963), Chapter 7.
Florida—Florida Statutes Annotated (1962), Title 33.
Idaho—Idaho Code (1968), Title 22.
Illinois—Smith-Hurd Illinois Annotated Statutes (1966), Chapter 5.
Indiana—Burns Indiana Statutes (1964), Title 15.
Iowa—Iowa Code (1949), Title 10.
Mississippi—Mississippi Code (1942), Title 19.
Montana—Revised Codes of Montana (1947), Title 3.
Nevada—Nevada Revised Statutes (1963), Title 51.
New Mexico—New Mexico Statutes (1953), Chapter 45.
Ohio—Page's Ohio Revised Code (1953), Title 9.
Oregon—Oregon Revised Statutes (1953), Title 49.
Tennessee—Tennessee Code (1954), Title 43.
Utah—Utah Code (1953), Title 4 and Title 5.
Washington—Revised Code of Washington (1962), Title 15.
Wyoming—Wyoming Statutes (1957), Title 11.

century. The Act here at issue is not inconsistent with any Congressional legislation. It is respectfully submitted that the judgment of the lower court should be reversed.

Respectfully submitted,
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No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

BRUCE CHURCH, INC.,
a California corporation
Appellee.

On Appeal from the United States District Court for the District of Arizona

APPELLEE'S BRIEF

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

BRUCE CHURCH, INC.,
a California corporation
Appellee.

On Appeal from the United States District Court for the District of Arizona

APPELLEE'S BRIEF

OPINION BELOW

The opinion of the three-judge District Court below was first set forth in an Opinion and Order dated January 29, 1969. Thereafter, Appellant herein (Defendant below) filed with the Court a Motion for Rehearing and/or

Clarification. On March 10, 1969, the three-judge Court reissued its earlier Opinion and Order in identical terms except that it added, as part of the last two paragraphs of its opinion, the three sentences which are indicated in italics below:

> "A reading of the Act reveals no clear basis nor authority for the issuance of the order by the defendant, Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, which order has been attacked by the plaintiff in this case. *The constitutionality of the Act, then, is not in question. What is in question is the construction placed upon that Act by the Superintendent and the constitutionality of the order issued by him pursuant to his construction.*
>
> "A review of the agreed statement of facts and the Act in question indicates that the order complained of constitutes an unlawful burden upon interstate commerce. See *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1, 49 S. Ct. 1; *Johnson v. Haydel,* 278 U.S. 16, 49 S. Ct. 6; *Schafer v. Farmers Grain Co.,* 268 U.S. 189, 45 S. Ct. 481; *Lemke v. Farmers Grain Co.,* 258 U.S. 50, 42 S. Ct. 244. *If the application of the Arizona Fruit and Vegetable Standardization Act, as interpreted by the Supervisor of Inspection, could be construed to be a valid interpretation and application of the statute, then the statute so interpreted and applied is unconstitutional.*" (App. 62.)[1]

---

[1]This was not a "new opinion" or "new decision" as characterized by Appellant (Brief, pp. 1, 11), nor was the ground of the ruling "unclear" as asserted by Appellant (Brief, p. 11). It was the exact same opinion as first issued, with the addition of the three sentences quoted in italics above pursuant to Appellant's request. (See Appellant's Motion for Rehearing and/or Clarification).

Thereafter, Appellant filed a further Motion for Rehearing, which was denied by the Court on May 1, 1969.

The above-mentioned motions, rulings, and Opinion and Order as filed on January 29, 1969 and March 10, 1969, are contained in the record on appeal. The full text of the Opinion and Order as filed on March 10, 1969 is contained in the Appendix, 58-63. It is from the judgment contained in this Opinion and Order that Appellant has taken this appeal.

STATUTE INVOLVED

In addition to the statutory provisions of the Arizona Fruit and Vegetable Standardization Act, Arizona Revised Statutes, Title 3, Chapter 3, Article 4, which are set forth in Appellant's brief (p. 2), there are others which have relevance to the issues. These will be referred to in the course of this brief. The text of such provisions will be found in the "Comparison of Laws of Arizona and California" which is set forth as a Supplement at the end of this brief. This case concerns the packing in California of cantaloupe crops grown in the State of Arizona, and the laws and procedures affecting such crops and the packing thereof in the States of Arizona and California constitute one of the subjects of the Stipulation of Facts (App. 38-43).

QUESTIONS PRESENTED

The questions presented are:

1. Whether Appellant's interpretation and application of the Arizona Fruit and Vegetable Standardization Act so as to prohibit Appellee from transporting cantaloupe crops grown by it at Parker, Arizona, across the State line into California, a distance of about 31 miles, for processing and packing at Blythe, California, where Appellee maintains packing sheds and other facilities for that purpose, constitutes an unreasonable burden on interstate commerce in violation of Appellee's rights under the commerce clause of the Constitution of the United States (Art. I, Sec. 8).

2. Whether in light of various enactments of the Congress of the United States expressly designed to foster the free movement of agricultural products in interstate commerce, including among them the Agricultural Adjustment Act, the Agricultural Marketing Act of 1946, the Standard Containers Act of 1915, and the Perishable Agricultural Commodities Act of 1930, Appellee's interpretation and application of the Arizona law is also in contravention of the supremacy clause of the Constitution (Art. VI).

STATEMENT OF THE CASE

1. Nature of Proceeding Below.

This action was brought by Appellee Bruce Church, Inc. on May 27, 1968, by Complaint filed in the United States District Court for the District of Arizona to obtain a declaratory judgment and to enjoin Appellant from enforcing his order which prohibited Appellee from trans-

porting its cantaloupe crops grown at Parker Arizona, across the State line into California for processing and packing there (App. 1-16). Processing and packing is accomplished at Blythe, California, in the same manner as when done in Arizona and using the same containers. The order threatened Appellee with loss of its cantaloupe crops that year, inasmuch as Appellee is without processing or packing facilities at Parker. A temporary restraining order was granted by United States District Judge Walter E. Craig on May 27, 1968 (App. 17-19).

Inasmuch as the Complaint raised questions of the constitutionality of a state statute, a three-judge Court was convened pursuant to Title 28 U.S.C. §§ 2281, 2284, the Court consisting of the Honorable Charles M. Merrill, Judge, United States Court of Appeals for the Ninth Circuit, and the Honorable Walter E. Craig and the Honorable Carl A. Muecke, Judges, United States District Court for the District of Arizona. A preliminary injunction was issued unanimously by the three-judge Court on June 7, 1968 (App. 54-57).

The matter came on for hearing on the permanent injunction on November 15, 1968, and such injunction was issued as above indicated by a unanimous Court. The case was submitted to the Court on a Stipulation of Facts dated November 4, 1968 (App. 26-53). Included in the Stipulation were depositions, taken prior to the hearing on the preliminary injunction, of David Gipe, General Manager of the Arizona operations of Appellee, and of Appellant L. J. Pike. The transcripts of their depositions taken on June 5, and 6, 1968 and the Exhibits offered in connection therewith, were made part of the records on

the preliminary injunction and the permanent injunction and are part of the record on appeal. Also included in the Stipulation of Facts is the Transcript of the hearing on the preliminary injunction at which there was presented oral testimony of Mr. Gipe and of Mr. Thomas H. McNamara, President of Appellee, as well as documentary evidence. This transcript as well as the documentary matter are part of the record on this appeal. Likewise included as part of the record on appeal is the transcript of the proceedings on the permanent injunction.

Although the crop immediately affected was the 1968 crop, the case did not become moot with the harvest of that crop. The issues are present and continuing ones inasmuch as Appellee's overall program and crop plans call for continued production of cantaloupe crops to be grown in the Parker district in the years to come and to be processed and packed across the state line of Arizona, in California, a practice which Appellant will continue to seek to prevent. (Stip. of Facts, App. 48). Planting of the year's crop starts in late February and continues through the middle of March. Harvesting commences early in June and continues to about the middle of July (Depo. L. J. Pike, June 5, 1968, pp. 28, 37). A cantaloupe crop was grown and harvested by Appellee in 1969, and unless the action of the three-judge Court is reversed by this Court, Appellee proposes to continue its program of growing cantaloupe crops in 1970 as well.

It will be noted that in granting the permanent injunction, the Court below did not declare the Arizona Fruit and Vegetable Standardization Act as a whole unconstitutional, nor did it hold the enforcement provisions

of the Act unconstitutional. From the portion of its Opinion and Order quoted above, it is clear that the Court was addressing itself to the facts of this case and held simply that Appellant's interpretation and application of the Act, in the circumstances presented here, constitute an unlawful burden upon interstate commerce and are therefore unconstitutional.

2. The Surrounding Facts and Circumstances.

The pertinent facts are set forth in detail in the Stipulation of Facts, which includes a description of Appellee's operations, the past practice of Appellant in respect of permitting transportation of cantaloupes across the State line into California for processing and packing, the issuance of Appellant's order in question, and its impact upon Appellee. It was stipulated (Stip., App. 47, 48), that there are no administrative remedies available to Appellee; that Appellee has no adequate remedy at law and will be irreparably injured; and that this is a proper case for equitable relief and the relief prayed for, if the acts of Appellant are wrongful or unlawful. The pertinent facts will be summarized below.

Appellee Bruce Church, Inc. is engaged in interstate operations.

Appellee is an independent, family-owned and controlled company which has been engaged for many years in the growing, harvesting, transporting, processing, packing and shipping of various kinds of fruits and vegetables in the States of Arizona and California. Almost all of its products are produced for sale, and are sold and shipped in interstate and foreign commerce (Stip.,

App. 28). Mr. McNamara, the company president, estimated that 99 to 100 per cent of the Company's fruits and vegetables went into interstate commerce (Transcript of Proceedings, June 7, 1968, p. 6, L. 20-21).

Appellee is a corporation of the State of California, with headquarters at Salinas, California. It has extensive farming operations in the Salinas Valley as well as in the San Joaquin Valley, the Imperial Valley, and at Blythe, in California. In the State of Arizona, it has operations at Parker, Yuma, Harquahala Valley, Aquila, and Horne. Of the total of approximately 25,000 to 30,000 acres owned or leased by Appellee for farming, approximately 15,000 acres are in the State of Arizona. (Stip., App. 30)[2]

Appellee's operations are geared to produce a continuing supply of its products.

It is generally recognized that the standing and competitive position of a grower in the produce trade is directly affected by its ability to afford its customers a continuing supply of a given product. (Stip., App. 46). Accordingly, Appellee's operations are organized so as to produce a continuing supply of the agricultural products desired by its customers. This is accomplished by taking advantage of the different growing seasons at the various interstate locations where climatic and soil conditions fit Appellee's overall plans, and by planning and synchronizing its crop production accordingly. In this

[2]Whether Appellant's characterization of Appellee as a "giant multi-million dollar farming corporation" is a proper one, is debatable. That it operates in both states in the manner described is not in issue.

way, Appellee is able to supply cantaloupes, among other commodities, during the entire production season in the growing areas of the West.

The importance of continuity of supply to the success of Appellee's business was stressed by Mr. McNamara and Mr. Gipe in their testimony. Mr. McNamara stated, in answer to questioning by counsel, (Transcript of Proceedings, June 7, 1968, pp. 8-9):

> "Q. You have customers, have you not, whom you must keep supplied with a continuous flow of produce?
>
> A. Yes, sir, this is right. Again this is what we base our company policies on, is to satisfy the needs of these customers and the demands of these customers over a period of years. . . . We develop contacts with many customers and they rely upon you for supplies, and you in turn expect them to stay with you over long, extended periods of time, with not only one product but with two or three products, and these would be again in both states, like lettuce, as an example, and cantaloupes.
>
> Q. And these crops mature for harvest in both states at different times of the year, do they not?
>
> A. Yes. This is right. The whole operation is synchronized to be in the best district for quality and production that you can be in, whether it is in Arizona or in California. Essentially as we call the winter operations would be in Arizona. And all of these basic operations must dovetail together, so that you have continuity again of supply. You try not to overlap and be in excess production for any period of time. We have essentially geared our operations to so many packages per day in each district, so we have to be very careful that we don't, as we move from Arizona to California, or vice

versa, that we do not overlap and have a huge peak of crop production which may be difficult to handle.

On the other side of the coin, we do not want to be out of product for any period of time. Number one, obviously, the people we deal with expect us to have this product every day. Number two, if you are out for any period of time, even a short period of time, you can completely miss the marketing opportunity.

Q. Now, does this also affect your competitive position in the industry?

A. Very definitely. If for any reason we are out for an extended period of time, we are definitely at a competitive disadvantage all the way through. This is a very competitive business, as you well know."

Mr. Gipe testified (Depo., June 6, 1968, p. 48):

"Q. Apart from the monetary loss which you would suffer, would you suffer any injury in relation to your customers?

A. Yes. We advertise to our trade through weekly newsletters, through national conventions, through trade media, publications, magazines, newspapers the fact that we can supply them with a continuous volume of melons throughout the entire shipping season of the first of June through Labor Day through the various districts we operate in, and a certain number of our trade book with us and stay with us for supplies because of this fact that we take care of them through the entire season.

If we have a void in there, it hurts. It's a breach of our ability to perform. It hurts.

Q. Is your competitive position among cantaloupe shippers affected by all of this?

A. Oh, yes. The cantaloupe business is a very competitive industry. If we were not able to harvest

this Parker crop, it would make a substantial difference in the market for that given period of time when this crop will be in its peak shipment, when this acreage will be in its peak shipment."

Further, by conducting its growing operations in this manner, Appellee is able not only to increase its production and achieve greater economy and efficiency, but also to effect a more even supply and thereby diminish to some extent the ups and downs of the produce market. This works to the advantage not only of Appellee, but also to the buyers and to the ultimate consumers, insofar as it tends to reduce extreme price fluctuations. (Stip., App. 29)

Economy and efficiency call for centralized facilities to serve the Parker-Blythe growing district.

Successful growing and shipping operations of an interstate character require extensive packing and processing facilities, as well as facilities for delivery to carriers in interstate transportation. However, certain growing districts in which Appellee operates are in sufficient proximity so as to make it possible and practical to locate packing and processing facilities at a centralized location close to rail, truck and air freight facilities, which will be adequate to handle the crops from the several nearby growing areas. This is true in the case of growing areas which, although in different states, are within a workable distance of one another, as is the case of Parker and Blythe. In such cases it becomes economically feasible to construct expanded facilities with all the equipment necessary to handle crops most efficiently and to insure that the produce reaching the markets will be of

the highest standards and quality. It also makes it possible to train and develop a highly skilled year-round labor force, which can assist Appellee in maintaining its reputation, which Appellant himself has admitted is "one of the finest in the business". (Stip., App. 29, 30, 31).

As stated by Mr. Gipe (Depo., June 6, 1968, p. 31, L. 16 - p. 33, L. 5):

> Q. And, as a matter of fact, and as a matter of economics, such facilities should be centrally provided where they can accommodate the produce of different nearby districts. Is that right?
>
> A. This is correct, so that sufficient volume can be processed through one facility with only one overhead cost and a sufficient volume can be processed through that facility for a good operational cost. and this is very important.
>
> Q. And in the case of various of your crops which are involved in these considerations you described, they are grown in border districts, are they not, that is to say adjacent to the border between California and Arizona?
>
> A. This is correct.
>
> Q. Whereas a practical matter to facilitate your packing processing for interstate shipment, a centralized facility located on one side near the border could serve the produce of both state border areas?
>
> A. This is correct.
>
> • • • •
>
> A. . . . and another reason I would like to bring up that we think this is so vital, so important to our total program is that this type of an operation allows us to have better quality control measures, allows us closer inspection of the product, would allow us to have a continuous work force for more months out

of the year whereby you could develop better talent, better labor which would give us this better quality we are striving for."

Appellee's project and crop program at Parker.

In furtherance of its overall plan of operation, Appellee, in 1964, entered into an Agricultural Lease with the Secretary of the Interior of the United States of America, as Lessor, the Commissioner of Indian Affairs, the Colorado River Indian Agency and the Colorado River Indian Tribes, pursuant to which Appellee undertook to develop approximately 6,400 acres of barren, arid uncultivated lands in the Colorado River Indian Tribes Reservation, at Parker, Arizona, covered with brush and mesquite. The magnitude of this undertaking, which is to extend over a term of twenty-five years, is described in more detail in the Stipulation of Facts, (App. 31-33 and Ex. A, following App. 50), in the Deposition of Mr. Gipe, as well as in the testimony of Mr. Gipe and that of Mr. McNamara, at the hearing on the Preliminary Injunction (Transcript, June 7, 1968, p. 12). In brief, it has involved extensive clearing and leveling of land, the construction of a complex irrigation system, canals, 41 miles of underground pipe, and other improvements, at very substantial cost. By the expenditure of great physical effort and very substantial sums of money (between three and three and one-half million dollars at the time this matter first came before the District Court), Appellee has been able to develop these lands to a point where they have begun to be productive. The work of development is to continue, with even more expenditure of effort and resources, apart from rental pay-

ments over the period of the lease which will be in excess of $1,500,000.00. (Stip., App. 31, 32).

Basic to the successful accomplishment of Appellee's undertaking at Parker is an effective crop program. To this end, Appellee has already brought approximately 6,300 acres of crops under cultivation. These include about 2,200 acres of barley, 1,700 acres of sorghum, 800 acres of cotton, 80 acres of onions, 40 acres of Bermuda seed, and about 1,000 acres of alfalfa.

Also included is a cantaloupe crop. This was done as part of Appellee's overall plan to develop a continuing supply of high quality cantaloupes for its trade. For many years past, Appellee has been growing cantaloupes on its farm lands at Yuma, Arizona, and has also been growing cantaloupes in the San Joaquin Valley, the Huron district, and at Mendota, in California (Stip., App. 33). The Parker district is well suited for the production of a high quality cantaloupe (Stip., App. 33), and its maturity and harvest dates fit in well with Appellee's other cantaloupe production schedules. Appellee entered into the lease of the Indian lands at Parker with the express purpose of making cantaloupes one of its basic crops at Parker, and cantaloupes have indeed constituted a most important part of Appellee's crop program at Parker. The year 1966 saw the start of cantaloupe production at Parker, with a modest 80 acres. In 1967, the acreage had been increased to over 400, with a gross return of $598,728.26 (Stip., App. 33). In 1968, the acreage harvested, packed and shipped by Appellee after the issuance of the Temporary Restraining Order totalled approximately 501 acres, with an estimated crop value of $700,000.00 (Stip., App. 33).

Essential railroad facilities do not exist to serve the Parker ranch and Appellee has had no processing and packing facilities at Parker for handling this highly perishable crop, but it does have such facilities available at Blythe, California, where it has processed and packed the cantaloupes up to this time.

Cantaloupes are a highly perishable crop, and must be harvested, processed and packed for shipment promptly on reaching maturity, or the crop will spoil and become worthless (Stip., App. 33). This calls for suitable and adequate processing and packing shed facilities with necessary rail sidings. However, while such facilities have been available to Appellee at Blythe, just across the state line in California, (it is about 25 miles from Parker to the California line and from there about 5 miles to Blythe), none have existed at the Parker Ranch (Stip., App. 34).

There are no rail facilities to the Parker Ranch. Such facilities are essential to a packing and shipping operation (Depo. David Gipe, June 6, 1968, p. 23, L. 10-18). Other firms which operate in the district do have rail facilities (Depo. L. J. Pike, June 5, 1968, p. 33, L. 14-16). To provide such facilities, it would be necessary for the railroad to bring in some 20 miles of track. Appellee would then have to construct a complete packing facility, a shed building and appurtenances, together with all necessary equipment, which would include packing equipment, conveyors, dumps, sorting tables, distribution belts, packer bins, crate racks, lidding machines, cull conveyors, cull storage bins, and moving equipment, such as trucks, fork lifts, etc. (Depo. L. J. Pike, *supra*, pp. 33-35). It was estimated that the cost of such packing facility, with rail siding at the packing shed, would be approximately $200,-

000. It would require about six months for construction alone, apart from the time required on the part of the railroad for acquisition of land and easements and laying of track, and for engineering work and development of plans and designs (Stip., App. 34; Depo. L. J. Pike, June 5, 1968, p. 35, L. 12-22).[3] Such an expenditure of capital, if made necessary because of the imposition of restrictions such as Appellant seeks to impose here rather than because of sound economic planning, would materially increase Appellee's costs of production and would thereby tend to impair its competitive position in the industry (see Stip., App. 37). Proper planning in relation to Appellee's overall operations in the area calls for a centralized facility, capable of handling a variety of crops.

Since it commenced cantaloupe production at Parker in 1966, Appellee has used the facilities at Blythe, California. There, Appellee is afforded a centralized location, with necessary railroad facilities for the proper handling of its crops grown in the general area, including the Par-

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[3]At page 10 of his brief, and also at page 33, Appellant refers to the estimated $200,000 shed cost as though it was the only factor involved. As will be apparent in our brief, this is but one of the losses which would be sustained by Appellee. The continuing and on-going losses in terms of duplication of facilities, equipment and personnel and in terms of loss of efficiency and economy of operation, would be immense over the years.

Furthermore, Appellant's statements might leave the impression that only the construction of a shed stands in the way of processing and packing of Appellee's cantaloupe crops at Parker. This is not the case at all. It would be necessary, as indicated, for the railroad to put in about 20 miles of track to the Parker Ranch to provide shipping facilities.

Appellant's assessment of the cost of a packing shed in terms of Appellee's "net profits", for one year or otherwise, or in terms of "crop value" is purely speculative and without any significance.

ker district (Stip., App. 37). This has enabled Appellee to carry out a more efficient and economical operation, while sending into the markets of the Nation a high grade product, at a lower cost to the consumer (see Stip., App. 37).

In processing and packing its Arizona cantaloupe crops at Blythe, Appellee has been following a practice permitted by Appellant, and followed by other growers as well, for many years since the Arizona law has been in effect.

As the Stipulation of Fact shows (App. 39-41), for many years past, various growers and shippers, with the knowledge of Appellant and without objection or complaint by him, his agents or employees, have transported cantaloupe crops, as well as other agricultural crops, in bulk across the state line of Arizona into the State of California for processing, packing and further shipment in interstate commerce. This was shown in Appellant's own official departmental reports for prior years. These annual reports (covering the years 1953 to 1967 only, these being the only annual reports available at the time) were identified as Defendant's Exhibits 5 through 18 in the deposition of Appellant L. J. Pike of June 5, 1968 and are part of the record on appeal.

Attached to the Stipulation of Facts as Exhibit "B" (App. 51, 40) is a summary showing produce grown in the Parker district in past years and taken across the state line in bulk to Blythe for processing and packing there. The summary, showing name of grower, crop and number of acres, was prepared by Appellant on the basis of the statistics appearing in his department's official annual reports for the years in question. The summary was iden-

tified as Defendant's Exhibit No. 1 in Appellant's deposition and is also part of the record here. The summary shows only watermelon, honeydew and cantaloupe crops, although lettuce also was a commodity similarly handled.

As for melon crops, the summary shows that in the years covered by Appellant's reports, several different growers and shippers harvested their Parker melon crops and transported them to Blythe for packing and shipment in interstate commerce, among them S. L. Eaton Farms, Martin Produce Co., Independent, Garin Company, Noroian Farms, Nish Noroian Farms, as well as Appellee. The cantaloupe variety was so handled during this period by S. L. Eaton Farms, Independent, Martin Produce Co. and Appellee. The firms named commenced the practice even before Appellee established its growing operations at Parker. Appellant stated in his deposition (June 6, 1968, pp. 4-8) that there may have been others, not shown in his reports, who grew cantaloupes at Parker and packed them at Blythe in prior years, including Suzie Belle Farms and Pacific Farms.

The existence of this practice prior to Appellee's coming to Parker was thus clearly noted, and reported without objection, in the official reports of the Appellant's own department for the years in question (Def. Ex. 5-18). Although not reflected on the summary, the practice commenced much earlier, as indicated in a letter dated September 27, 1968, from the Land Operations Officer, Bureau of Indian Affairs, Parker, Arizona, which is attached to the Stipulation of Facts as Exhibit "C" (App. 52). Over the years, mixed melons, carrots, citrus, onions, barley, milo and alfalfa have been moved in bulk from the

Parker Valley or other Arizona districts into California to Blythe. As pointed out in the letter of the Bureau of Indian Affairs: "It appears that some melon crop grown on the project has been processed in Blythe, California, every year since 1948."

It is clear that over the years the acreage affected ran into the thousands, and that the number of trailers permitted to make the crossing ran into many thousands.

It was in reliance on this long-continued past practice that Appellee undertook to plant and grow its cantaloupe crops at Parker. Just as it had grown such crops at Parker in 1966 and 1967, Appellee, in January of 1968, undertook to plant and grow another cantaloupe crop to mature about June 10, 1968, which it proposed to harvest, place in trailers and transport in bulk to Blythe for processing, packing and shipment in accordance with the practice of prior years (Stip., App. 41).

Appellant's notice of prohibition notwithstanding earlier long-continued and approved practice.

After permitting this practice for years and with full knowledge that Appellee already had its crop in the ground without any processing or packing facilities at Parker capable of handling the crop at harvest time (Stip., App. 41), Appellant, on March 22, 1968, informed Appellee by letter that it would not be permitted to transport its cantaloupe crops across the state line into California for packing and processing at Blythe (Stip., App. 41). Absent necessary facilities at Parker, the order threatened Appellee with loss of its entire crop. Appellant, in his deposition admitted that he knew as early as

the Fall of 1967 that Appellee was going to plant a cantaloupe crop for 1968 (Depo. L. J. Pike, June 5, 1968, p. 38, L. 22-p. 39, L. 12).[4]

Appellant's notice to Appellee was very brief. It stated simply that no fruits or vegetables grown in Arizona "will be allowed to leave the State of Arizona unless they meet all the requirements as set forth in these respective laws", referring to the standardization laws of Arizona. Appellant admitted in his deposition that the notice was for the express purpose of informing Appellee that he would not permit its cantaloupe crops to be taken from Parker to Blythe for processing and packing there as above described (Depo., *supra*, p. 55, L. 21-24). Appellant, notwithstanding the practice which he had permitted for many years as being consistent with a proper interpretation of the standardization laws of Arizona, was now taking a totally different course. His letter cited no particular section of the standardization laws which was claimed to be in question. No reasons were given for the issuance of the order, no statement of grounds or explanation of any sort.

The record shows, however, that the order was directed to Appellee following Appellant's attendance at a meeting of the Board of Directors of the Vegetable Growers Association of Central Arizona.[4a] The Association is one of

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[4]Appellant testified in his deposition (Depo. *supra*, p. 38, L. 22-26): "Yes. I would say that we were probably aware of what was going to be planted last fall before it was ever planted. . . . From our men being over there inspecting and visiting with the shippers every day . . . ."

[4a]This is the Association which Appellant, in footnote 8 on page 38 of his Brief, states has been associated with the Arizona Attorney General's Office, "at the expense of the Arizona Vegetable Growers Association," in prosecuting this action.

several grower and shipper associations in Arizona. The minutes of the meeting do not show it (Stip., App. 49) but a principal subject of discussion at the meeting, according to Appellant's own testimony in deposition, was "the Church Company moving cantaloupes across the line" (Depo. L. J. Pike, June 5, 1968, p. 55, L. 19-20). Appellant had been requested to attend this meeting (Depo. *supra*, p. 45, L. 26), but Appellee was not represented (Depo. *supra*, p. 52, L. 19-21). The record indicates further that following his mailing of the letter to Appellee, Appellant sent a copy to each of the members of the Board of Directors, apparently to inform them of the action he had taken following the meeting. As stated by Appellant: "Well, I sent them because of the fact that I attended a meeting with them when they discussed this situation" (Depo. *supra*, p. 43, L. 19-21). According to Appellant, the letter of notification was sent to certain other growers and shippers who are members of the Association, but it was not sent to all the growers and shippers in the State of Arizona (Dep., *supra*, p. 47, L. 16, p. 48, L. 3). In his deposition, Appellant testified that he had no file copies of the letters he sent except a copy of the letter he sent to Appellee. Asked why he kept a file copy of the letter to Appellee and not the others, he replied, "Well, because at the time, they are the only one in question about it that I knew of" (Depo., *supra*, p. 54, L. 13-16).[5]

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[5]On page 11 of Appellant's Brief, in footnote 5, Appellant quotes the letter. However, it was not addressed to "Various Shippers" at all. It was addressed to "Bruce Church, Inc., P. O. Box 599, Salinas, California". (See Def. Ex. 4 to Depo. L. J. Pike, June 5, 1968).

That the action was directed at Appellee, and Appellee alone, can hardly be questioned.[6]

The processing and packing of the Arizona cantaloupes at Blythe has been carried out under inspection procedures and standards very similar to those of Arizona, and the packing has been done in the very same containers as are approved by Appellant and used in Arizona.

The State of California, like Arizona, has had a standardization law for many years, and, indeed, the Arizona law was patterned after the California law. The California law, as does the Arizona law, applies to cantaloupe crops. The law includes provisions (California Agricultural Code, Sections 45633, 45663 and 45664) which relate to the packing of cantaloupes in standard containers of the same sizes and descriptions as those prescribed in

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[6]On page 10 of his Brief, Appellant makes statements, unsupported by record evidence, implying that Appellant's action was related to a bill in the Arizona legislature which failed of passage. There is no evidence in the record whatever as to what the terms or provisions of any such bill were, who sponsored its introduction, what its legislative history was, or what its effect, if any, would have been on the matters involved in this case. Neither the bill nor any of the matters above mentioned were in evidence in the Court below and have no part in the proceedings before this Court. Nor is this a proper subject of judicial notice. The only reference in the Stipulation of Facts to any bill in the Arizona Legislature is to the effect that the minutes of the meeting of the Arizona Vegetable Growers Association attended by Appellant show the following:

> "Those minutes state that current legislation before the Arizona Legislature was discussed at the meeting. Two bills were discussed. The first concerned the use of DDT and the second the bulk movement out of the State of vegetables and melons. The minutes state that the DDT Bill was referred to a Committee of the Association for further study, and that as to the latter bill, no formal action was taken by the Board." (Stip., App. 49).

There is no evidence in the record whatever that any "bill" was "defeated." Indeed, in his deposition, Appellant referred to a bill which "was passed." (Depo. L. J. Pike, June 6, 1968, p. 8, L. 26).

Arizona. These standard containers are of uniform dimensions and specifications adopted by the authorities of both states as part of a plan to achieve uniformity among growers and shippers in the Western States generally. They are so used by growers, many of whom carry out the same growing, packing and shipping operations in the several states, such as Arizona and California, as does Appellee. These growers supply the same customers with the same agricultural products, packed in the same uniform containers, from both the States of Arizona and California. The equipment used by them in their processing and packing operations in both States is the same, geared to handling the same uniform containers (Stip., App. 42).

There exists generally a close liaison between the produce industries of California and Arizona. Some growers and shippers are Arizona residents operating in both Arizona and California, and vice versa. For many years, growers in the Bard Valley of California, including growers of cantaloupes, Appellee among them, have been transporting their products across the state line of California into Yuma, on the Arizona side of the Colorado River, for processing, packing and further shipment to interstate markets, in the same manner as has been done from Parker to Blythe. This has been known to Appellant (Stip., App. 42).

The conditions and standards provided by the standardization laws of Arizona and California are likewise very similar. We have prepared and attached as a Supplement to this brief a tabulation setting forth the text of particular provisions of the laws of both states. It is

readily apparent from a comparison of these provisions that they have a close similarity both in wording and effect. Indeed, the terminology used in a number of instances is so similar as to make it unmistakably clear that one law was used as a model for the other.

As a result of this uniformity of treatment, cantaloupes undergo the same basic inspection procedure in both states. Because of the highly perishable nature of cantaloupes, the process of harvesting them, transporting them to the shed facility, processing, packing and shipping them is one continuous, uninterrupted and rapid process accomplished within a matter of a few hours. Under the existing practice, the cantaloupes are transported from the field to the packing shed in trailers. The Arizona inspectors are stationed in the fields where the harvest is in process, they inspect the cantaloupes daily, and each day they issue "pickle worm" inspection certificates on the crop. This is the same "pickle worm" inspection which is made with respect to all cantaloupes picked in Arizona and shipped to California and similarly certificated. *The inspection certificates given Appellee in this manner are expressly given for delivery by Appellee to the State of California inspector, stationed on the Arizona side of the border, at the time the cantaloupes are taken across the state line into California.* This has been the daily procedure during each of the years Appellee has grown cantaloupes at Parker (Stip., App. 38-39). As described by Mr. Gipe (Transcript of Proceedings, June 7, 1968, p. 27, L. 6-12), "the [Arizona] State inspector comes into the field and looks at the crops in the trailer before they are transported and as they are being transported," and

the certificate for delivery to the California inspector at the crossing is issued.

At the packing shed in Blythe, the procedure and practice of sorting, inspecting, packing and processing by Appellee has been carried out as to grade, quality and pack in the same manner and with the same high standards as its cantaloupe production handled in Arizona, at Yuma. The cantaloupes have undergone there the same basic inspection procedure as in Yuma, including a rigid inspection by Appellee's own personnel. They have been carefully sorted, processed and packed in standard containers, approved in Arizona as well as California, and sent on to interstate markets.

The cantaloupes are also subject to *federal inspection.* In the case of shipments going to Canada or the international trade, the federal inspection is required. In other instances, a federal inspection is made on the packed fruit when called for by the shipper (Testimony of David Gipe, Transcript of Proceedings, June 7, 1968, p. 26, L. 3-10).

As for the containers, the standard containers used in Appellee's operations are the same in whatever district or state, or locations, it operates. There are three sizes of cartons, each being of fixed dimensions, each being assigned a tariff number which is the same in both California and Arizona, and each being officially approved for use by both states. The crate most commonly used is in evidence as Plaintiff's Exhibit No. 1 in the deposition of L. J. Pike, June 5, 1968, p. 59 (Stip., App. 38-39). This crate, known as the "jumbo" crate is used by Appellee about 95% of the time (Depo. David Gipe, June

6, 1968, p. 44). Each of the various containers used for cantaloupes is identified by the same tariff number in both states (Depo. David Gipe, *supra,* p. 44), *the tariff numbers being assigned under the authority of the Interstate Commerce Commission of the United States.*

Appellant, whose experience as a member of the Standardization Service extends over more than 30 years, testified, in his deposition, that the standardization laws of Arizona have been in effect over 35 years, and the standardization requirements of Arizona parallel those of California "pretty close" (Depo. L. J. Pike, June 5, 1968, p. 5-6, p. 62, L. 8-14). He testified further concerning the "very close" liaison relationship which exists between the produce industries of both states, (Depo. *supra,* p. 62, L. 15 - p. 63, L. 2). He himself, prior to entering the Standardization Service, had worked, among other growers, for a produce firm which operated in the Salinas Valley and the Imperial Valley of California as well as in Arizona, very much as Appellee does, and he ran its packing sheds in all three locations. (Depo. *supra,* p. 6-9). All the produce firms he worked for were interstate shippers. (Depo. *supra,* p. 10, L. 13-19).

He testified further that uniformity is a matter of great importance, both as to containers used as well as methods of production, harvesting and packing, many of the crops grown in both states being the same (Depo. *supra,* p. 63, L. 14-20). He confirmed the fact that the growers and shippers who operate in both states plan their overall crop programs in relation to the growing and harvesting seasons in each of the states, so as to coordinate their production and develop a continuous sup-

ply of a given commodity, so far as possible (Depo. *supra*, p. 63, L. 21 - p. 64, L. 3). These growers and shippers, he conceded, have customers all over the nation whom they must keep supplied, and continuity of supply is a very important factor in retaining a good customership (Depo. *supra*, p. 64, L. 4-12). He testified further that the produce industry is a highly competitive industry and that continuity of supply is important in order to enable a grower-shipper to maintain his competitive position among growers and shippers of the same commodity (Depo. *supra*, p. 64, L. 13-20).

Concerning the inspections carried out by inspectors of the State of California, Mr. Gipe testified at the hearing on the preliminary injunction that such inspection is as stringent as the inspection carried out in Arizona, if not more stringent.

The following testimony was given by him at pages 24 through 25 of the hearing transcript:

By Mr. Abramson:

"Q. Mr. Gipe, from your experience in having participated in cantaloupe harvesting, processing, and packing operations in both the States of California and Arizona, what aspects of this operation are subject to inspection by the inspectors of both states?

A. The inspectors in both states inspect the commodity of cantaloupes for physical blemishes or physical deformities of the individual melon, such items as sunburn, sun scald, growth cracks, excessive green, overripes, individual melons that are not up to standard.

Q. From your experience, would you say that the inspection carried out by the California inspectors is

as stringent as that carried out by the Arizona inspectors?

A. Yes. From a practical application there is very little difference between the degree of inspection between the inspectors of the two states, and inspection of the California inspector is as stringent if not more so than the Arizona inspector's.

Q. There is a very close relationship, is there not, between the produce industry in Arizona and that of California?

A. A very close relationship in our cantaloupe operation. Our staff of workers in the cantaloupe shed, our graders, our sorters and packers work on both sides of the river, as it were, work all of our deals with practically no knowledge that there is a different standard or different requirements from deal to deal or shed to shed.

Q. The containers which are used for packing the melons are the same in both states, are they not?

A. This is correct. And the numerical count of cantaloupes within that container are the same."

The cantaloupes are sold in carload or truckload lots to wholesale buyers, receivers or distributors, or to chain stores, who are located in various parts of the country and who generally have representatives at the site inspecting and selecting the produce they are buying.

The cantaloupes here in question are not sold by Appellee, or other interstate growers and shippers, directly to the housewife or consumer, nor are they sold to retail stores. They are sold rather in carload or truckload lots to wholesale buyers, jobbers, receivers or distributors in the terminal markets of the nation, or to chain stores. These organizations generally make their purchases

through agents, produce brokers or buying representatives on the ground, referred to as "ground buyers" or "ground brokers", who will personally inspect the crop and make their selection of produce. Some organizations will purchase directly by phone ("the wire trade") (App. 41-42). However, in all instances, those who do the buying know what and from whom they are buying, that is to say who the grower is, where the cantaloupes were grown and the type, grade and quality. All of these features the buyers will specify, and these are the factors which are reflected in the price agreed upon at the time of purchase. The crate used by Appellee has imprinted thereon "Packed in season in Arizona and California, Main Office, Salinas, California" (Depo. David Gipe, June 6, 1968, p. 60, L. 22-24). But as Mr. Gipe testified, when questioned by Appellant's counsel concerning the reputation of one growing district over another: "It doesn't make any difference what kind of reputation your district has if you don't have a good product that given year. *These buyers inspect the product.*" (Italics supplied) (Depo. David Gipe, *supra,* p. 29, L. 23-26).

The buying group with which the grower-shipper deals is, therefore, a relatively limited, but knowledgeable, group. When the container reaches the store level, the cantaloupes are removed from the container, and, so far as the housewife is concerned, she does not see the container at all. She does not identify the cantaloupe as to source at all and does not buy on that basis. (See generally Transcript of Proceedings, June 7, 1968, p. 6, L. 2-7; Transcript of Proceedings November 15, 1968, pp. 83-86.)

Appellee's processing and packing of its 1968 and 1969 crops following the District Court's orders were carried out in conformity with the same procedures, standards and practices as before.

After the issuance of the District Court's restraining order and injunctions, Appellee's harvesting, processing, packing and shipping of its Parker cantaloupe crops were carried out in the same manner as in prior years, without problems of any kind. This involved inspection of the crops by Appellant's representatives in the field and the issuance by them of "pickle-worm" inspection certificates to be delivered to inspectors of the state of California at the border (Stip. App. 38-39). At the packing shed in Blythe, the cantaloupes were subject to inspection by inspectors of the State of California as to their compliance with governmental quality standards and standardized pack (Stip., App. 36). This was in addition to the inspection performed by Appellee's own personnel, as well as federal inspection where appropriate. The cantaloupes were then packed in the same standard containers as are approved for use in both Arizona and California, and were then sent on to markets throughout the Nation and in foreign commerce (Stip. App. 38, 33).

Appellee will suffer irreparable injury in a variety of ways if Appellant is permitted to carry out his threats.

If Appellant were to succeed in preventing Appellee from engaging in cantaloupe production at Parker, the loss and injury accruing to Appellee would be reflected in a variety of ways. Appellee's 1968 crop, having an estimated value of approximately $700,000.00, would have been lost, of course (Stip. App. 45), and Appellee would have been unable to produce a crop for 1969 or future

years. In connection with the 1968 crop, Appellee had to place advance orders and make commitments for packing crates, ice, and other supplies, and much of the value of these would have been lost. Also, Appellee was committed at the time to rental payments which would have resulted in a loss if the crop could not be packed at Blythe (Stip., App. 47).

Of a particularly serious nature would be the irreparable damage and injury sustained by Appellee in its relations with its customers, who depend on continuing supplies of produce. This would directly and immediately hurt Appellee's competitive position in the produce industry and in the cantaloupe trade in particular (Stip., App. 33-34).

If Appellant's threatened action were to become effective, this would also cause serious interference with Appellee's contractual relations with the United States Secretary of the Interior, the Commissioner of Indian Affiairs, the Colorado River Agency, and the Colorado River Indian Tribes, as lessors of the Parker lands. Such conduct would seriously interfere with and materially impair the successful development of these Indian lands and would tend to discourage and frustrate private investment for the development of these waste lands into productive farm lands. It is stipulated that such would be the testimony of Appellee's officers if called to testify (Stip., App. 45-46), without any contradictory testimony. The lease agreements were entered into with the obvious intent that Appellee would be allowed to apply its broad experience and resources to the job of developing these hitherto useless lands for the ultimate benefit of both the

company and the Indian Tribes. After the termination of the leases, the lands will revert to the Indian Tribes. They will in the meantime have been trained by Appellee in the most modern and approved agricultural practices, so that the Tribes may continue to farm the lands for their own exclusive benefit.

Significantly, Appellant's action would result also in substantially diminished cantaloupe crops in interstate markets, with consequent higher prices to the consumer. Defendant's Exhibit No. 2 in Mr. Pike's deposition of June 5, 1968 is a document showing the melon acreage grown in 1968 by various growers in the Western districts of Arizona which would mature and be harvested at or about the same time as the Parker crop. Defendant's Exhibit No. 3 shows the cantaloupe acreage in Central Arizona which is under harvest at or about the same time. It is readily apparent that Appellee's acreage at Parker constitutes a very substantial part of the crop being harvested at this time of the year. In the Parker-Poston district, Appellee's crop constituted in 1968 about one-third of the area's crop. It is obvious that elimination of Appellee's product from the market would have a direct, immediate and substantial effect on the price of cantaloupes at that time of year. As Mr. Gipe testified (Depo. June 6, 1968, p. 48, L. 18-p. 49, L. 19):

> "A. Oh, yes. The cantaloupe business is a very competitive industry. If we were not able to harvest this Parker crop, it would make a substantial difference in the market for that given period of time when this crop will be in its peak shipment, when this acreage will be in its peak shipment.
>
> Q. Now, would your competition derive any benefit if your crop was lost?

A. Absolutely, because there would be a supply being offered for sale, and the market is determined in our business on the supply and demand basis, and if some of the supply is removed, the demand increases and the market goes up.

Q. According to the figures brought by Mr. Pike, Defendant's No. 2, your acreage in the Parker-Poston area would appear to be approximately one-third of the acreage, and would this have a substantial effect in the respect you have just described?

A. Yes, it would. It's impossible to put a monetary figure on it because it depends on how many melons are coming out of the other districts at that particular time, but it would have a very substantial effect on it.

Q. Would the producers in the Salt River Valley during this harvest period benefit from the loss of your production?

A. Absolutely."

Concerning Appellee's losses, had it not been able to pack its cantaloupe crop in 1968, Appellant Pike testified in his deposition that neither he nor the State of Arizona would have made good any such loss (Depo. June 5, 1968, p. 57, L. 6-16).

On the other hand, when asked by Appellee (Depo. June 5, 1968, p. 59, L. 6-13), "if, assuming . . . that the Church company would pack its cantaloupes at Blythe in the same container and under the same inspection standard as would apply in Arizona, what damage or detriment would you suffer by this so far as your standards for packing, your criteria concerning deceptive packs and so forth are concerned?", Mr. Pike replied, "I wouldn't as long as it's under a court order" (Depo. June 5, 1968,

p. 59, L. 19-20). He would consider that the standards of Arizona have then been met (Depo. June 6, 1968, p. 11, L. 20-24).

As previously noted, Appellant has stipulated that Appellee would suffer irreparable injury as a result of his order if carried out.

The issue here presented is a present and continuing one and has not been rendered moot by the expiration of the 1968 growing season.

Under its lease agreement, Appellee is inextricably committed to its Parker project. It must go forward with the physical improvement and development of the Ranch. It must continue to develop its crop programs. These call for cantaloupe crops in current and future years. Appellee's plans call for an expansion of its cantaloupe production at Parker as part of its overall interstate operations. Although the lease on the shed facilities at Blythe ended by its terms upon the close of the 1968 season, the lease has been and is subject to renewal, and the facilities continue to be available to Appellee for current and subsequent seasons (Stip., App. 47). However, while the Blythe facility is adequate for crops of the quantities presently planned, it would be necessary to construct a new and larger facility to handle substantially increased crops. Such a facility would be constructed at a location that would be in Appellee's best interest, considered from a business standpoint in the light of Appellee's total farming operations and relevant economic factors. Appellee has not yet decided whether it would be in its economic best interest to locate a new facility at Parker, or at Blythe, or elsewhere. However, the facility, when

built, would be a centralized facility, close to rail and air freight facilties, and capable of handling cantaloupes and other crops grown by Appellee in the surrounding area (Stip., App. 37-38).

These plans would be frustrated if Appellant were to carry out his continuing threat to prevent Appellee from taking its crop across the state line. The injury to Appellee's operations which was averted by the District Court's orders would take effect in the future if the effectiveness of those orders is not continued. Both parties have stipulated that the issue here involved is a continuing one and should be resolved by the Court at this time (Stip., App. 48).

SUMMARY OF ARGUMENT

The unanimous judgment of the three-judge District Court below, enjoining Appellant from enforcing his order which would prohibit Appellee from transporting cantaloupe crops grown by it at Parker, Arizona, across the state line for processing and packing at Blythe, California, where Appellee maintains packing sheds and other facilities for that purpose, is fully supported by the facts and the law of the case.

There is ample support for the Court's finding that there is no clear basis or authority in the Arizona Fruit and Vegetable Standardization Act for the issuance of such an order, and that any interpretation and application of the law as embodied in Appellant's order is unconstitutional as constituting an unlawful burden upon interstate commerce.

As a company which has been engaged for many years in the growing, harvesting, transporting, processing, packing and shipping of various kinds of fruits and vegetables in the states of Arizona and California, Appellee has clearly been engaged in interstate commerce. Almost all of its products are produced for sale and are sold and shipped in foreign and interstate commerce. This is true not only in respect of Appellee's general operations but also in respect of its cantaloupe crops grown at Parker, Arizona. At Parker, Appellee has undertaken, under a long term Agricultural Lease with the Secretary of the Interior of the United States, as Lessor, the Commissioner of Indian Affairs, the Colorado River Indian Agency, and the Colorado River Indian Tribes, the development of approximately 6400 acres of barren, arid, uncultivated lands in the Colorado River Indian Tribes Reservation. With extensive effort and considerable investment of capital, Appellee has brought these lands to the point of production. This production has been an integral part of Appellee's overall operations, which are geared to produce a continuing supply of agricultural products for its trade.

Among the crops grown at Parker is a cantaloupe crop. The growing season there fits in very well with Appellee's overall program for a continuous supply of this product. However, Appellee does not have at Parker the packing and processing facilities needed to handle this crop. It does have such facilities at Blythe, which is located about 31 miles from Parker, 5 miles across the Arizona-California border. To make such facilities available at Parker would require, apart from necessary pack-

ing sheds, equipment, rail siding, and other facilities, about 20 miles of railroad track to be installed by the railroad company. None of these facilities presently exist at Parker, and when and if such facilities will be available there, is not now known. The facilities used by Appellee at Blythe afford the company a centralized facility for the processing and packing of its various crops grown in the general Parker-Blythe growing district, an arrangement which permits better handling of these highly perishable commodities, with greater economy and efficiency of operations. This has a direct bearing upon Appellee's competitive position in the industry. Appellee's cantaloupe production at Parker contributes to the supply of this commodity and is reflected in a more favorable price to the consumer.

So far as cantaloupes are concerned, because of their highly perishable nature, they must be sent on their way to the shed for processing, packing and shipping the moment they are harvested. The process from field to railroad car is one continual, uninterrupted and rapid movement, accomplished in a matter of a very few hours. The cantaloupes enter the stream of interstate commerce literally the moment they are taken out of the ground.

In processing and packing its Parker cantaloupes at Blythe, Appellee has been following a practice permitted by Appellant, and followed by other Parker growers as well, for many years since the Arizona law has been in effect. Appellant has regularly reported this practice in his annual departmental reports and has even participated in it by instituting a program for the issuance of a certain type of inspection certificate to be delivered, for

border clearance, to the California Inspector stationed on the Arizona side of the border. This practice continued without question until Appellant's present order, which was issued by him just prior to the time when harvesting of Appellee's 1968 cantaloupe crop was to begin. The order was directed to Appellee notwithstanding that Appellant had had knowledge of Appellee's plans to grow the crop months before it was planted, and notwithstanding that he knew Appellee had no facilities at Parker to process and pack the crop. Appellee stood to lose the entire crop, whose value was estimated at about $700,000.00.

The processing and packing of the Arizona cantaloupes at Blythe has been carried out under inspection procedures and standards of the State of California which are very similar to those of Arizona, and the packing has been done in the very same standard containers as are approved by Appellant and used in Arizona. The California law, embodied in the California Agricultural Code, is very similar to the Arizona Act. Indeed, the Arizona Act was modelled after the California law. There exists a close liaison between the produce industries of the two States, many growers carrying on operations on both sides of the state border.

The effect of Appellant's order, as Appellant himself has necessarily admitted, would be to require Appellee to do its packing in Arizona. More particularly, it would require Appellee to construct a packing plant and other facilities in Arizona where the product could be packed, before it could be taken out of the state. The

case, therefore, falls clearly within the principle of earlier decisions of this Court, such as *Toomer v. Witsell,* 334 U.S. 385 (1948), *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935), *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928), *Johnson v. Haydel,* 278 U.S. 16 (1928), *Schafer v. Farmers' Grain Co.,* 268 U.S. 189 (1925), and *Lemke v. Farmers' Grain Co.,* 258 U.S. 50 (1922). These cases held that a state statute which, by its necessary operation, directly interferes with or burdens interstate commerce is a prohibited regulation and invalid, regardless of the purpose for which it was enacted. The *Toomer v. Witsell, Foster-Fountain Packing Co. v. Haydel* and *Johnson v. Haydel* cases were very similar to the present case on their facts. Each of those cases involved action by a state official acting under authority of a state statute (of South Carolina in *Toomer v. Witsell* and of Louisiana in the other two cases) which prohibited the transportation out of the state of fish obtained in the state, for processing and packing in a neighboring state where the fishermen had their own facilities and equipment for accomplishing this work. In each instance, this Court held that the threatened state action constituted an undue burden upon interstate commerce. It found that the purpose of the action was to serve economic interests of the state rather than interests falling within the police powers of the state and could not be sustained as a reasonable burden on interstate commerce.

The cases mentioned above were in line with various other decisions of this Court which are referred to in the course of our Argument. The Opinion and Order of

the Court below makes reference to a number of these cases.

Appellant's contention that his order does not affect interstate commerce because interstate commerce is not involved here at all is, we submit, without justification in light of the facts and legal precedents we have referred to. The cases upon which Appellant relies, principally *Federal Compress and Warehouse Co. v. McLean*, 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood, Miss.*, 291 U.S. 584 (1934), are cases which involved a local tax on goods (cotton) which had come to rest and were being stored in a warehouse, and neither these nor any of the other cases relied upon by Appellant involved a situation such as here, in which the state sought to impose a requirement that packing of the commodities be accomplished in the state as a condition to their being taken out of the state.

Appellant's contention that the burden imposed by his order, if any, is not an unreasonable one, is likewise, we submit, insupportable. The obvious effect of Appellant's order is to cause a direct and immediate *stoppage* of interstate commerce. This applies not only to the *movement* of the goods in interstate commerce but also to the *production* of goods for interstate commerce for, obviously, if Appellee is not able to take its produce out of the State of Arizona as a result of Appellant's order, it will have to cease production. Additionally, as already indicated, Appellant's order would have the effect of requiring the construction in the State of Arizona of packing sheds and other facilities. Apart from the additional cost of construction of packing sheds and facilities, rail-

road lines and related appurtenances, there would be continuing and on-going losses in terms of duplication of facilities, equipment and personnel, with resultant loss of efficiency and economy of operations, damaging the grower's position in the trade. Furthermore, it would hamper and impede the successful development of the Indian lands for the benefit of the Indian Tribes as well as the grower.

The record clearly shows that Appellant's order is designed fundamentally to serve the local economic interests of the State of Arizona, rather than the public health and safety, and the burden imposed by such order cannot be sustained as an exercise of the police power of the state, as claimed. Any interest which the State of Arizona may have in the quality of Appellee's crops is adequately protected by the necessity of Appellee's having to conform to the equally as stringent, if not more stringent, requirements of the law of California. In many instances, there is a federal inspection as well. The State of Arizona may, if it desires, carry out any inspections of its own. The law of Arizona gives the Supervisor ample scope for carrying out inspections in the fields, in the trailers or in any of a variety of places he may choose, and at any stage. Indeed, Appellant is already carrying out an inspection in the field.

The unreasonableness of Appellant's order is emphasized by his long continued practice of permitting packing across the line in California, a practice followed by a number of growers including Appellee. This long continued administrative practice, we submit, reflects the correct interpretation of the Arizona law.

For the foregoing and other reasons set forth in this brief, the finding of the Court below that Appellant's threatened action was violative of the interstate commerce clause is fully justified.

Additionally, Appellant's threatened action would be violative of the supremacy clause of the Constitution, in that such action would be contrary to, and would tend to defeat, the objectives of the Congress of the United States in a series of federal enactments designed to remove impediments to the free flow of agricultural commodities in interstate commerce, and to improve the efficiency of facilities, methods and processing of agricultural commodities shipped to interstate markets as well as other phases of interstate traffic in agricultural commodities. Among such enactments are the Agricultural Adjustment Act, the Agricultural Marketing Act of 1946, the Standard Containers Act of 1915, and the Perishable Agricultural Commodities Act of 1930. These Acts of the Congress are of long standing and have been implemented by an extensive body of rules and regulations promulgated by the Secretary of Agriculture.

The supremacy clause was one of the grounds on which Appellee relied in the Court below. The Court did not find it necessary to review this issue, having found Appellant's order violative of the commerce clause. However, we consider the issue of such substance as to merit the Court's consideration on this Appeal.

We submit that Appellant's threatened action is violative of both clauses of the Constitution and the judgment of the Court below permanently restraining Appellant from carrying out his order, should be sustained.

It is not our contention that the Arizona law as such is unconstitutional, and the Court below has not so held. We do not challenge the right of the State of Arizona to adopt a standardization law for fruits and vegetables or its right to enforce such a law. The law of Arizona, its provisions, standards, and requirements, are entitled to full enforcement by the State of Arizona *as to all packing operations which take place in the state.* Appellee has for many years operated a packing shed at Yuma, Arizona, where it has packed its Yuma cantaloupes, among other commodities, and, in connection with such operations, Appellee has at all times been unquestionably subject to the standards and inspection procedures set up by the Arizona law.

Appellee's contention is, however, that *the State of Arizona may not require that Appellee perform its packing in that state and not in the State of California.* In interpreting and applying the Arizona law to permit this, Appellee, we submit, is going beyond constitutional limitations. We submit it is not the prerogative of the State of Arizona to tell a grower where he should do his packing, or where he should establish his packing facilities. We submit it is neither the prerogative nor the function of the State of Arizona to enter into a determination, or a weighing, of the economic factors indicating where it is to Appellee's best advantage to build a centralized packing facility. We submit these are company matters.

Indeed, Appellant himself has admitted in his testimony that the interests of the State of Arizona would not suffer if Appellant is permitted to do what he has been doing all along pursuant to Court sanction.

ARGUMENT

I

APPELLEE, AS A GROWER AND SHIPPER OF AGRICULTURAL PRODUCTS IN THE STATES OF CALIFORNIA AND ARIZONA, IS ENGAGED IN INTERSTATE COMMERCE NOT ONLY IN RESPECT OF ITS GENERAL OPERATIONS, BUT ALSO IN RESPECT OF ITS CANTALOUPE CROPS GROWN AT PARKER, ARIZONA, AND THE OPERATIONS SOUGHT TO BE PROHIBITED BY APPELLANT ARE PART OF INTERSTATE COMMERCE.

The facts pertaining to Appellee's operations demonstrate beyond any question that Appellee is engaged in interstate commerce. This applies to Appellee in respect of its overall activities, with farming and packing operations in the States of Arizona and California and with almost all its products being sold in interstate and foreign commerce (Stip., App. 28). It is also true in respect of the cantaloupe crops grown by Appellee at Parker, which are also shipped to markets throughout the Nation (Stip., App. 38).

The cantaloupes at Parker enter the stream of interstate commerce as soon as they are harvested. As the cantaloupes are picked in the fields, they are placed in large trailers which are used to transport them to the processing and packing facility at Blythe. While in Arizona they undergo a "pickle worm inspection" by officials of the State of Arizona. These officials then issue a certificate which clears the crop for interstate transport across the state line into California. The certificate itself is delivered to the California inspector at the border. When the cantaloupes reach the packing facility at Blythe, they are inspected, sorted, processed and packed in standard containers under supervision and control by Appellee as well

as under inspection procedures carried out by inspectors of the State of California in the manner heretofore described. The cantaloupes are then loaded on refrigerated railroad cars or trucks, and go on their way to markets throughout the United States and in foreign commerce.

The process of harvesting, putting in trailers, transporting to Blythe, processing, packing and loading onto railroad cars or trucks is one continuous, uninterrupted process, as indeed it must necessarily be because of the perishable nature of the product. Movement of the cantaloupes in interstate commerce starts immediately when they are taken out of the ground and placed in trailers for transport to Blythe.

The Supreme Court of the United States has declared that interstate commerce begins at "that time *when goods begin their interstate journey* by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control." *Lemke v. Farmers Grain Co.*, 285 U.S. 50, at 55 (1922) (italics supplied). In the *Lemke* case, harvested grain which was being placed in a grain elevator with the intent of shipping it out of state was held to be in the stream of interstate commerce.

The above principle has been applied where a product in its natural condition was being taken within the state to a receiving depot for transshipment out of state for processing there. The raw product was held to be in the stream of interstate commerce. Thus, in the case of *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949), it was held that raw milk which was being delivered by farmers to receiving depots in New York where it would be weighed, tested and if necessary cooled before being shipped to

Boston for processing and sale, was in the stream of interstate commerce. Likewise, in the case of *Toomer v. Witsell*, 334 U.S. 385 (1948), shrimp taken out of the waters of the State of South Carolina and being taken by the fishermen to the State of Georgia for processing and packing in their facilities there, were found to have entered the course of interstate commerce. To the same effect are *Foster-Fountain Packing Company, Inc. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928).

These cases have direct application to the facts of this case where the cantaloupes, immediately upon harvest are being transported for processing, packing and shipment onward to markets across the country.

The determinative factor is that the product is in course of going into interstate markets. As stated by the Court in the *Lemke* case (258 U.S., *supra*, at p. 55):

> "It is true, as appellants contend, that after the wheat was delivered at complainants elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. *That was the course of business, and fixed and determined the interstate character of the transaction.*" (italics ours)

It is Appellant's contention that interstate commerce is not involved here at all. Thus, Appellant poses as an issue in this case (his Brief, p. 5):

> "Whether, under this Court's decisions in *Federal Compress and Warehouse Co. v. McLean*, 291 U.S.

17 (1934) and *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934) the strictures of the commerce clause are even relevant, since the regulation occurs and is terminated prior to the time that the regulated goods move in interstate commerce;"

The assertion that "the regulation occurs and is terminated prior to the time that the regulated goods move in interstate commerce" is without any support whatever in the facts of this case, which show most clearly that

(1) Appellee is an interstate grower and shipper, almost all of whose products are packed, sold and shipped in interstate commerce, including the cantaloupes here in question; and that these products are expressly grown for shipment, intended to be shipped, and are in fact shipped to markets throughout the Nation and in foreign commerce.

(2) Due in large part to the highly perishable nature of the product, the process of harvesting, hauling to shed, processing, packing and shipping of the cantaloupes is one continual, uninterrupted and rapid movement, accomplished in a matter of a very few hours, as indicated above. The product literally never comes to rest. It is not stored or warehoused, as in the cases cited by Appellant. It enters the stream of interstate commerce the very moment that it is severed from the ground.

(3) Appellant in the present case is not seeking to regulate an activity which Appellee is performing in the state. He is seeking to prevent *movement* itself, movement of the cantaloupes from Parker across the state line to Blythe. The cantaloupes are then already on their way in the stream of commerce as part of the continous process above described.

(4) The effect of Appellant's order, if Appellee were not to be prohibited from sending its products forth into the stream of commerce, is to require Appellee to engage in certain affirmative acts in the State of Arizona, including the processing and packing of its products there, doing the processing and packing in a packing shed located in Arizona, and constructing a packing shed in Arizona for such purpose—notwithstanding the existence of facilities used by Appellee for performing all the foregoing at Blythe, under similar standards and procedures, and in the same containers, as are used in Arizona (see II C 2, *infra*).

We respectfully submit the activity involved in this case is clearly part and parcel of the flow of interstate commerce, and to contend that it is not is to engage in a fruitless task of attempting to draw fine lines not in accord with present-day business realities. We submit this position is amply supported by the cases we have already cited and discussed above.

The *Federal Compress* and *Chassaniol* cases cited by Appellant are basically different and wholly distinguishable from the present case. In those cases, the so-called regulatory act in question was the levy of a local tax on goods (cotton) which had come to rest in a warehouse, where they could sit for a long time before entering the stream of commerce. This was the subject of great stress by the Court in the *Federal Compress* case, 291 U.S. 17, at p. 21:

> "It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce, and hence is not a subject of interstate commerce immune from local taxa-

tion. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end. . . ."

In the present case, the cantaloupes have not come to rest in Arizona, but are on their way to California.

Cotton, unlike cantaloupes, is not a perishable commodity, and it is apparent from a reading of the *Federal Compress* case, *supra,* that the normal course of business in dealing with cotton is for it to be transported to a warehouse, where it comes to rest, is stored, and sometime later is compressed and sent on into the stream of interstate commerce. On the other hand, cantaloupes, as a highly perishable commodity, cannot be allowed to come to rest and be stored at any stage of their journey from the field to market, without seriously endangering their quality and marketability. They must immediately be set in motion to their ultimate destination (Stip., App. 33).[7]

In the *Federal Compress* case, the statement is made: "Before shipping orders are given, it has no ascertainable destination without the state. . . ." (291 U.S., *supra,* at p. 21). Conversely, in our case the cantaloupes being transported by Appellee do have an ascertainable destination without the state, which is Appellee's packing facility at Blythe, California. Further, the *Federal Compress* case makes note of the fact that the cotton is "withdrawn from transportation", whereas there is no such withdrawal in the case of Appellee's cantaloupes. They must immediately

[7]Appellant's argument that "whether cantaloupes have a shorter or longer storage period than cotton is therefore immaterial" (Brief, p. 18) has no relevance whatever to the facts of this case. Cantaloupes, as the record shows, have no storage period at all and, because of their inherent characteristics, cannot have any.

be carried from the field to market in the most expeditious manner.

We may point out, as is well known to the Court, that the National Labor Relations Board and other federal regulatory agencies have taken jurisdiction over transportation of goods such as are involved in the present case, on the basis that interstate commerce has come into play. The National Labor Relations Board has taken jurisdiction over employer-employee relations in the area, which is reflected in labor contracts between growers and shippers and teamsters, for example.

The fact is that even the packing operation itself is under similar National Labor Relations Board jurisdiction, and the packing process is indeed a phase of interstate commerce. We respectfully submit the *Federal Compress* and *Chassaniol* cases are of little aid in relation to the facts of this case.

The *Federal Compress* case, as Appellant's quote from that case on page 17 of his Brief indicates, itself distinguished "local taxation" from a case comparable to the present case in which "local regulations of the business of purchasing a commodity within and *shipping it without the state* have been deemed to impede or embarrass interstate commerce in those commodities" (291 U.S. 17, at p. 22) (italics ours); and among the cases cited by the Court is *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, a case which we have brought to the attention of the Court below and on which the Court has relied. Likewise, in the *Chassaniol* case, the Court likened the local tax to an "occupation tax" or a "property tax", (291 U.S. 584, at 587) (see Appellant's quote, p. 17 of his Brief).

In neither the *Federal Compress* nor the *Chassaniol* cases was there involved, as here, state action which would require the performance in the State of Mississippi of packing operations which the packer desired to carry out in a sister state. The distinction between a local regulation affecting an activity which is already taking place in the state and the requirement that an operation take place in the state in order that it might be regulated, was noted by the Court below at the hearing on the permanent injunction. As Judge Merrill remarked, in colloquy with Appellant's counsel (Transcript of Proceedings of November 15, 1968, p. 34, L. 23-p. 35, L. 13):

> ". . . Suppose that a packer in interstate commerce, who ships all of his produce out of the State of Arizona, suppose that that packer has a facility in Arizona and complies or is asked to comply with the Arizona laws which would apply to such facility. Now, it seems to me that perhaps we have one question, under the authorities, as to whether Arizona can properly regulate this local aspect of an interstate operation, including taxing it."
>
> Mr. Lee: "Yes."
>
> Judge Merrill: "And, another question, which would be quite different, as to whether Arizona can insist that that operation take place in Arizona, irrespective of what the shipper wants to do."
>
> Mr. Lee: "I see."
>
> Judge Merrill: "I think that perhaps we have two different questions there. . . ."

And again (Transcript, *supra*, p. 51, L. 2-12):

> "Judge Merrill: Well, I'll tell you what is still troubling me a little bit is the distinction that I have

> already suggested. I think that what you are doing is creating a hypothetical packing shed, saying you can regulate. It is not yet in interstate commerce yet in the sense that we can't regulate this intrastate aspect. But you don't have that kind of situation here. You are insisting that we create one so that you can regulate it. This is what I am wondering about, whether we can go that far.
> Mr. Lee: Yes, I realize that there are some conceptual difficulties with that. . . ."

It was noted by the Court below that the *Federal Compress* and *Chassaniol* cases involved taxation (Transcript, *supra*, p. 50, L. 20), and the question was asked by Judge Merrill, "Would it have been proper for that state to insist that cotton be compressed within the state so that it could tax it?" (Transcript, *supra*, p. 67, L. 6-8).

It is respectfully submitted that the *Federal Compress* and *Chassaniol* cases are not at all comparable to the present case and do not present the same issues.

What has been said of *Federal Compress* and *Chassaniol* is also true of *Parker v. Brown*, 317 U.S. 341 (1943), upon which Appellant relies. That case involved a prorate activity only, affecting without discrimination all area producers and wholly intrastate in nature, as the Court stressed. It did not involve goods in process of moving to market. The goods in *Parker v. Brown*, as in the *Federal Compress* and *Chassaniol* cases, were goods in storage and could have been so for long periods of time. The Prorate Act, it may be noted, moreover, was one expressly sanctioned and collaborated in by the Federal authority as being a conservation measure, consistent

with the federal objectives under the Agricultural Marketing Act and the Agricultural Adjustment Act.[8]

Appellant attempts to distinguish the cases of *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922), and *Shafer v. Farmers' Grain Co.*, 268 U.S. 189 (1925), relied on by us. We respectfully submit that in so doing Appellant serves only to emphasize our point. Appellant must necessarily concede these cases hold that a state cannot regulate the purchase of grain where the grain is intended for prompt shipment outside of the state. Appellant suggests this applies to cases where the goods are to leave the state without processing (Brief, p. 18). Without going into the question whether those decisions are to be so narrowly construed, we need merely point out that no processing of the goods in the present case is taking place in Arizona either. Rather, the goods are in the act of being shipped out of the state for processing.

Appellant asserts (Brief, p. 19) that "the state of Arizona is free to implement the regulation of its fruits and

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[8]As Judge Muecke commented regarding the California action involved in the *Parker v. Brown* case (Transcript of Proceedings, November 15, 1968, p. 59, L. 4-19):

"Judge Muecke: They did it under the provisions of the Agricultural Adjustment Act, through a state law that was enacted pursuant to that act and they did it on a showing of a long history of a disastrous price fall, which even put the raisins below the cost of production, which would have wiped out the whole industry. And they were trying to establish some price stability for the industry and preserve the industry.

Mr. Lee: Everything you say is correct, Judge Muecke.

Judge Muecke: And they took it right at the beginning, so it is quite obvious what they were doing here was pursuant to both Federal and State law and it had a reasonable means for a reasonable end. But I don't quite follow that in terms that it has to be in boxes in order to have good——"

vegetables at the packing stage free from commerce clause strictures." But this Argument, we submit, merely begs the question. As pointed out, we are not dealing here with an attempt to regulate an activity—packing—which is taking place in Arizona, because the packing is not taking place in Arizona. It is rather a question *whether Arizona can require that the packing be done in that State* in order to regulate it.

Appellant states further (Brief, p. 19): "The Appellee's contention in the Motion to Dismiss that the regulation here at issue prevents interstate movement itself, rests upon bootstrap logic. The interstate movement to which the Appellee refers is necessarily that of cantaloupes which do not meet the quality and packing standards of the Act. Such cantaloupes are prevented from moving in interstate commerce. . . ." This, of course, is not the case at all. Appellant's order is an absolute prohibition of the taking out of the state of *all* cantaloupes without regard to quality or condition—even the very best —unless they have been first packed in Arizona, in a packing shed in Arizona, in prescribed containers.

The Court below held that such an order (1) affects interstate commerce (2) casts an unreasonable burden on interstate commerce. We submit this ruling is consistent with the decisions of this Court and is eminently sound.

II

THE PROHIBITION SOUGHT TO BE IMPOSED BY APPELLANT CONSTITUTES AN UNDUE BURDEN AND OBSTRUCTION ON INTERSTATE COMMERCE.

A. Appellee, as a grower and shipper engaged in interstate commerce, has a constitutional right to carry out its operations free from unreasonable restrictions sought to be imposed by Appellant under color of authority of a statute of the State of Arizona.

Article I, Section 8, of the United States Constitution confers upon Congress the power ". . . To regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes . . ."

The power to regulate and control interstate commerce thus vested in the federal authority, was founded on sound practical considerations. As expressed by the Supreme Court of the United States in *H. P. Hood & Sons v. DuMond,* 336 U.S. 526, at 539 (1949):

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court, which has given it reality."

And as expressed by Justice Cardozo, writing for a unanimous Court in *Baldwin v. G. A. F. Seelig, Inc.,* 294 U.S. 511, at pages 522, 523 (1935):

> "If New York in order to promote the economic welfare of her farmers, may guard them against competi-

> tion with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."
>
> "The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together and that in the long run prosperity and salvation are in union and not division."

The basic thrust of the Commerce Clause, therefore, was to protect the individual whose production is destined for interstate markets against restrictive action by the state.

As applied to this case, it is clear that Appellee, as a producer of products which it channels into the stream of commerce between the states, has the constitutional right to conduct its business in a manner which will permit it to take into consideration economic factors, free of unreasonable restraints sought to be imposed by state authority.

In line with these principles, Appellee, we respectfully submit, has the constitutional right to engage in the planting of crops on land owned or controlled by it, secure in the knowledge that when the crops mature, it will be able to harvest these crops and transport them to facilities owned or controlled by it for processing and packing and placing them in railroad cars or other transport devices for carriage to interstate markets, whether the facilities in question are in the state of production or in a neighboring state.

State action which unduly burdens interstate commerce has as little validity when it takes the form of official

interpretation and application of state statute as when it takes the form of express statutory prohibition.

In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 at 552 (1935), the Supreme Court stated:

> "It is the established doctrine of this Court that a state may not, *in any form or under any guise* directly burden prosecution of interstate business." (italics supplied.)

In the present case, the threatened prohibition is equally violative of Appellee's constitutional rights whether it is founded on the express provision of the Arizona Standardization Act itself or upon an interpretation or application of that Act by Appellant.

B. This Court has declared action similar to that of Appellant unconstitutional in cases closely paralleling the facts of the present case, and the decision of the three-judge District Court below was in keeping with these precedents.

Decisions of the Supreme Court have held consistently that a state statute which, by its necessary operation, directly interferes with or burdens interstate commerce is a prohibited regulation and invalid, regardless of the purpose for which it was enacted, and will not be permitted to stand. *Toomer v. Witsell*, 334 U.S. 385 (1948); *Baldwin v. G. A. F. Seelig*, 294 U.S. 511 (1935); *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928); *Schafer v. Farmers' Grain Company*, 268 U.S. 189 (1925); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922).

The decision of the three-judge Court below sought to give effect to these established precedents of this Court. (Opinion and Order, App. 62.) Included among these

cases are some which parallel the facts of the present case very closely.

For example, in *Toomer v. Witsell,* 334 U.S. 385 (1948), the Supreme Court had under review a statute of South Carolina which required that all boats licensed to troll for shrimp in the State's waters were to dock at South Carolina ports and unload, pack and stamp their catch there before shipping or transporting it to any other State. Certain shrimp fishermen wanted to take their catch into the State of Georgia, where they had their own facilities for processing and packing. They brought action against the South Carolina officials charged with enforcement of the statute, seeking an injunction on constitutional grounds based on the Commerce Clause, as in the present case. The matter was heard before a three-judge Federal District Court, which upheld the statute and denied an injunction. The Supreme Court reversed, holding that the statute tended to cause an undue burden on interstate commerce in violation of the Commerce Clause and was therefore invalid and unenforceable.

Mr. Chief Justice Vinson, in his opinion, stated:

> "The record shows that a high proportion of the shrimp caught along the South Carolina coast, both by appellants and others, is shipped in interstate commerce. There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina

employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry" (*Id.* at 404).

The *Toomer v. Witsell* case presented the strongest possible case for State control because of the recognized common law property interest of the State in its fish and game, a factor which is not present in the instant case. Notwithstanding this, the Supreme Court found that the State could not impose conditions on shipments out of the state so as to burden interstate commerce. The Court laid heavy stress on "the importance of having commerce between the forty-eight States unimpeded by local barriers" and upon the principle "that State restrictions inimical to the Commerce Clause should not be approved simply because they facilitate in some measure" enforcement of the State law (*Id.* at 406).

Foster-Fountain Packing Company, Inc. v. Haydel, 278 U.S. 1 (1928), also presented a case whose facts closely parallel those of the present case. There, an official of Louisiana attempted to prohibit the transportation of shrimp out of the State of Louisiana, unless the hulls and heads had first been removed in the State of Louisiana. His action was based on the Louisiana Shrimp Act. The plaintiff, which had its processing facilities in the State of Mississippi wanted to take the shrimp out of the State of Louisiana and have them packed in Mississippi. Although the State of Louisiana had a strong common law property right in its fish and game, the Supreme Court held that the prohibition of transportation of shrimp out of the State unless their hulls and heads had been first removed

in Louisiana was unreasonable and imposed an undue burden upon commerce. The officer charged with enforcement of the Louisiana law argued that the purpose of the Act was conservation, but the Court held that in its practical operation, the law resulted in an impermissible direct burden upon interstate commerce. The Court held that the actual purpose of the Louisiana Shrimp Act was not to retain the shrimp for use of the people of Louisiana, but rather to favor the canning of the meat and the manufacturing of shrimp bran in the State of Louisiana, by withholding raw or unshelled shrimp from processing plants owned or operated by the packers in Biloxi, Mississippi.

The same result was reached in a companion case, *Johnson v. Haydel,* 278 U.S. 16 (1928), in which interstate oyster packers successfully challenged the Louisiana Oyster Act, which was similar to the Shrimp Act.

These cases hold a close analogy to the present case, where the practical effect of Appellant's application of the Arizona Fruit and Vegetable Standardization Act is to require that the packing and processing of Appellee's cantaloupe crops be performed in the State of Arizona, rather than in the neighboring state of California, in which Appellee maintains its own packing and processing establishment, as a centralized facility equipped and organized to serve Appellee's overall crop activities in the border districts of California and Arizona. If Appellee were required to set up duplicate facilities at Parker (even if a rail line were to be brought in by the railroad), this would bring on considerable additional cost to Appellee and would result in an uneconomical, inefficient and unbusinesslike operation.

Further, as in the cases cited, if Appellee were forced to conduct its processing and packing operations in Arizona, Appellant and the State of Arizona would thereby necessarily be diverting to the State of Arizona business, employment and taxes which might otherwise go to California. If such result could be enforced upon Appellee under circumstances such as here, it would necessarily follow that similar effects could be enforced upon interstate producers of other agricultural commodities, and, indeed, upon interstate businesses of every type and kind. If the Appellant were to succeed in doing this, notwithstanding the requirements of the Commerce Clause, it would open the way for every State in the Union to take similar action for its protection. This would then have the effect of imposing an "artificial rigidity" on commerce between the states in direct contravention of the intent of the Framers of the Constitution, who recognized that the free flow of commerce and trade among the several states was essential to the success of our federal form of Government. We respectfully submit the factors which motivated the Framers to adopt this basic policy find even stronger ground today.

Consistent with the decisions of this Court such as the foregoing, the three-judge District Court below found Appellant's order to constitute an unlawful interference with, and burden upon, interstate commerce, and therefore invalid. We submit the Court's decision finds ample support in both the facts and law of this case.

C. The unreasonableness of Appellant's order is demonstrated by a number of factors, some of which were not present in prior cases which this Court considered as involving unreasonable burdens on interstate commerce.

1. The effect of Appellant's order is to cause a direct and immediate stoppage of interstate commerce—movement and production, both.

It is readily apparent that Appellants' threatened action would not only cast a burden upon interestate commerce, but it would directly, immediately, and effectively stop it. His order amounts to an *absolute prohibition* of the interstate transportation which Appellee has carried out in the past. It would arrest movement of the goods at the state border. As Judge Merrill inquired of Appellant at the hearing (Transcript of Proceedings, November 15, 1968, p. 60, L. 11-12):

> "As to the Church operations, where are you imposing your regulations—right at the state line?"

We can conceive of no action which would have a greater impact upon the flow of goods in interstate commerce than the act of stopping it while on its way.

Appellant asserts (Brief, p. 19), that the state's program "is objected to by one of the regulated corporations on the asserted ground that the program has an ancillary impeding effect to one degree or another on the flow of commerce across the state lines." As indicated above, Appellee's objection—which is to the acts and threats of Appellant and not the "program" as such—does not rest merely on "ancillary impeding effect to one degree or another". Appellee's objection rests on the *absolute prohibition* of transportation across the state line which is here involved. This is not a case merely of impediment to interstate commerce as affecting prod-

uce which *ultimately* moves in interstate commerce. Rather it is a case of attempted prohibition and interference with produce which *is* in the course of movement in interstate commerce.

Furthermore, it is apparent that Appellant's threatened action would have the effect of *stopping production itself*—of goods intended for interstate commerce. If Appellee, being without railroad and other facilities required by Appellant's order, cannot transport its cantaloupe crops to Blythe for processing and packing there, it will obviously have to cease production of this commodity. Surely, there can be no more drastic interference with interstate commerce than to foreclose production of commodities which would go into the stream of commerce. Appellant, in his Brief at page 33, states that there are two other shippers in the Parker District, the Garin Company and the Tri-Produce Company, who pack their cantaloupes in Arizona, and he asks why Appellee cannot do likewise. The fact is, however, as the record shows, that the shippers named have railroad lines into their packing sheds. (Depo. L. J. Pike, June 5, 1968, p. 33, L. 14-16.)

2. Appellant's order would have the effect of requiring Appellee to undertake costly projects and adopt uneconomical and inefficient business practices as a condition to shipment of its products out of the state.

In his Jurisdictional Statement filed with this Court (p. 10), Appellant stated:

> "The problem from the Appellee's standpoint is thus strictly an economic one: under the Act, appellee cannot ship its cantaloupes unless they have been inspected; they cannot be inspected by the appellant

> unless they are packed in Arizona; and they cannot be packed except in a packing shed."

Appellant makes a similar statement in his Brief, at pp. 21-22.

Appellant's statement is premised on his argument that inspection of the produce for defects can be accomplished "only" in the packing shed and that an inspection in the field is "impossible" (Brief, p. 22, 23).

There is no support in the record for such premise at all.[9] Nevertheless, Appellant's position, as stated by him

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[9]At page 9 of his Jurisdictional Statement, Appellant makes the statement, not supported by the record, that: "The parties stipulated at the oral argument before the district court that cantaloupes can be inspected for the defects proscribed by the statute only at the packing stage," citing Transcript of Proceedings, November 15, 1968, p. 70-71. Examination of those pages will disclose that this was not the stipulation at all. What appears there is simply that "the inspection best takes place at the stage of sorting, when the cantaloupes are sorted, and at the present time this can most conveniently and efficiently be done in the packing shed." Accordingly, this statement hardly suggests that inspection can take place *only* at the packing stage, but relates solely to convenience and efficiency. This was recognized by the Court below, as reflected in the comment of Judge Craig (Transcript, *supra*, p. 63, L. 10-12): "So then you say, in effect, it must go through a packing shed, because that is where you get a more practical place to look at them . . ."

Appellant makes the further statement that inspection for quality defects at a stage other than the packing stage "would be inordinately disruptive to the shipper's operations and impossible for the inspector to accomplish." The record contains no evidence whatever on this point.

Appellant also states in his Jurisdictional Statement (p. 9) that inspection of cantaloupes to determine compliance with the standardization laws "simply is not carried out in this State or any other State" except at the time cantaloupes are sorted and packed. There is no evidence whatever in the record as to how the inspection of cantaloupes is carried out in other states, except in California: and, of course, as already indicated, there is no basis for the further statement on page 9 that the sorting and packing "must" be accomplished at the packing shed, or,

above, is clear: the effect of the Arizona law, so far as Appellee's operations are concerned, is three-fold:

(1) Appellee's cantaloupes must be packed in the State of Arizona.

(2) They must be packed in a packing shed situated in Arizona.

(3) Appellee must construct such a packing shed in Arizona.

Appellee would necessarily have to comply with all three requirements in order to be permitted to ship its cantaloupe crops in interstate commerce. And this, notwithstanding the fact that Appellee already has adequate centralized facilities at Blythe to serve its general needs in the Parker-Blythe growing district.

That this was the necessary effect of Appellant's position was recognized by the three-judge Court below. Thus, Judge Craig inquired of Appellant's counsel: ". . . aren't you saying that no cantaloupe grown in the State of Arizona can leave the State of Arizona without going through a packing shed?" (Transcript of Proceedings of November 15, 1968, p. 62, L. 1-4). And the implications of Appellant's position in light of this Court's prior decisions referred to above were the subject of the following colloquy between Court and counsel for Appellant

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as stated in his Brief (p. 22), that sorting and packing can be done "only" in a packing shed. Appellant's statement cites deposition testimony of David Gipe, p. 10, L. 8-13, but all Mr. Gipe stated was that under present methods it was not "practical" to do otherwise and that other methods had not yet been tried "on a large commercial scale." Appellant's statement is even inconsistent with his earlier statement (Brief p. 8), citing the same testimony of Mr. Gipe, to the effect that "under present technology, it is not *commercially feasible* to sort and pack cantaloupes except in a packing shed." (Italics ours).

(Transcript of Proceedings of November 15, 1968, p. 36, L. 12 to p. 38, L. 13):

"Judge Merrill: I have a little trouble, I must confess, with the legitimacy of the state interest in that unless it is being packed in Arizona.

Mr. Lee: Well——

Judge Merrill: Now, suppose it is being packed in California, what legitimate state interest has Arizona once the fruit has left the State? It would have a legitimate interest in fruit coming into the state——

Mr. Lee: No question.

Judge Merrill: ——if it is sold to Arizona consumers. But I must confess I have a little difficulty in the legitimacy of the state's interest as to produce which is going to be sold interstate, and whether, if you assert such an interest, you are not categorizing or separating out an area of interstate commerce with which you have this concern, and if you are not really separating out interstate commerce for the purpose of regulating interstate commerce as distinguished from your regulation of intrastate commerce.

Mr. Lee: All right. Let me answer that in two parts. Of course, that is the whole case and in the answer to that particular question you solve this lawsuit. And there are essentially two answers to it, and they are both supported, in my view, Judge Merrill, and I cannot see a meaningful difference, they are both supported by square holdings of the United States Supreme Court.

The first one is that as long as you assert the regulation at a stage which involves some processing prior to shipment in interstate commerce, that is not interstate commerce. That is point number one.

And the second point is—

Judge Merrill: Still subject to the problem that I have of being able to regulate it, if it takes place—

Mr. Lee: Yes, I suppose that's true.

Judge Merrill: —distinguished from the insistence that it should take place.

Mr. Lee: Yes, I suppose that's true, because then you would be in the Toomer v. Witsell, Baldwin v. Seelig category.

Judge Merrill: *I wonder if you have any authorities, such as the shrimp cases, which would recognize your right to insist that certain processes take place in the state rather than the right to regulate those processes which actually do take place?*

Mr. Lee: *No, I don't think you will find, to be perfectly candid, I don't think you will find any statute or any case which will say that any state has the right to insist that certain processes take place in the State of Arizona. I think that is a Baldwin v. Seelig violation of the Constitution.*

Judge Merrill: *I must confess that I have a little trouble seeing that you are not asking that"* (italics supplied).

In the Court below, as well as here, Appellant was arguing on the basis of such cases as *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934) and *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934). But the Court recognized that those were cases which involved simply the imposition of a local tax on processes already in existence in the state, and did not require the performance of affirmative acts and the establishment of new facilities and processes such as here.

Appellant, both in the Court below and here as well, suggests that distinctions are to be drawn between situations calling for uniformity and situations calling for diversity (Brief, pp. 23-29). But while such distinctions

may be meaningful in given situations, we submit they have little significance here. Thus, as examples of diversity, Appellant refers to the cases of *Cooley v. Board of Wardens of the Port of Philadelphia,* 12 How. 298 (1851), and *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938). Cooley involved a state law which required that vessels in the harbor of Philadelphia take on pilots or pay a portion of the pilotage fee, a measure which was clearly a safety measure within the police powers of the state. The *Barnwell* case involved regulation of the width and weight of trucks traveling state highways. These measures were adopted in the interest of highway safety, and the Court held them to be within the police power of the state.

But, on the other hand, are the cases of *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959) and *Southern Pacific Company v. Arizona,* 325 U.S. 761 (1945), which are cited by Appellant as examples where the principle of uniformity prevailed. In the *Bibb* case, a statute of Illinois required trucks and trailers using state highways to use a certain type of mud guard. After weighing the law's effect in furthering the purported state interest against the strong national interest to keep interstate commerce free from undue burdens, the Court found that the state law would indeed cast such an undue burden on interstate commerce and declared it invalid. In the *Southern Pacific* case, there was involved a law of Arizona limiting the number of cars in passenger and freight trains. After considering the practicability of the state regulation and its effectiveness in meeting state standards in relation to the burden on interstate commerce, the

Court concluded that the burden on interstate commerce was insupportable and it invalidated the law.

But, however pertinent the considerations of uniformity and diversity may have been in the above cases involving vehicle safety regulations, they have little application here. Although Appellant discusses this theory at some length, he does not demonstrate why the present case should fall into the category where diversity between the states is of such paramount importance as to justify the restraint on interstate commerce. Indeed, it is amply clear that the present case, of all cases, is one where uniformity is the desired goal, for obviously, the situation which concerns us here is one which calls for uniformity, which has already seen the attainment of a high degree of uniformity, and which will require even greater uniformity, in the interest of commerce between the states, as our advancements in transport, refrigeration, farming methods, and packing techniques continue. This must necessarily be, because agricultural products are not consumed locally but are shipped all over the nation. If the various states were to adopt local laws making different requirements concerning standards of quality and containers with respect to agricultural products being transported through their jurisdictions, a situation could develop much like that referred to in the cases cited in the briefs, where the product would have to be stopped at each state border for inspection and unpacking in accordance with the local law. Such a result would, of course, not be tolerated under the cases referred to.

Distance today—even where perishable commodities are involved—has little meaning. As is clearly set forth in

the Stipulation of Facts, and as our Brief points out, the States of California and Arizona have become bases of operation for growers and shippers operating on a regional basis in both states. They grow their crops on both sides of the Arizona-California line. Produce grown by them in California has been taken across the state line to Arizona for processing and packing, and vice versa. The authorities of both states have recognized the practice over the years. Growing areas, by virtue of similar soil and climatic conditions, know no artificial state borders, and efficient and enterprising growers make use of these opportunities for worthwhile production in the national interest. Reflecting this closeness and consequent need for uniformity, are the state laws themselves. That the laws of Arizona and California have a very close similarity—and in some respects complete identity—surely requires no serious argument. As we have already indicated, one was modelled after the other. The processes of inspection and packing are the same, including in many cases an inspection by federal inspectors. The containers used are the same. They are even identified under identical tariff numbers prescribed by the Interstate Commerce Commission.

We submit, therefore, that Appellant's argument that the matters here involved do not burden interstate commerce because they are "local" in character has no foundation in reality or in the record of this case. As for his contentions based on an asserted absence of congressional action, these too choose to ignore the clear congressional policy, as expressed in the enactments to be referred to herein, that the channels of commerce be kept

unimpeded for the free flow of agricultural commodities to all parts of the Nation.[10]

The cases relied on by Appellant, we submit, are distinguishable from the cases presented here and do not provide helpful precedents. They all involved the propriety of local taxation or regulation of activities taking place within the state. None of them involved situations such as here where, as the Court below indicated, the effect of state action was to require that operations sought to be performed elsewhere be performed in the state in order that they could be regulated. In none of the cases cited by Appellant was there involved an express prohibition which would prevent commodities produced in the state from being taken out of the state unless first packed in the state, or in the words of Judge Craig, which would say "that no cantaloupe grown in the State of Arizona can leave the State of Arizona without going through a packing shed . . ." (Transcript of Proceedings, November 15, 1968, p. 62, L. 1-4).

Appellant cites the case of *Sligh v. Kirkwood,* 237 U.S. 52 (1915) (Brief, p. 29), but that case is wholly distinguishable from the present case. In *Sligh* there was involved a Florida statute making it an offense to handle citrus fruits unfit for human consumption and injurious to health, and the statute was upheld by the court as a health and safety measure in the exercise of the state's police

[10]At page 7 of his Brief, Appellant himself makes reference to the importance of uniformity in this area. He states:

"The value of standardizing containers for agricultural produce is also borne out by the practice of the United States Department of Agriculture. A number of Federal Marketing Orders prescribe that fruits and vegetables governed by the relevant order must be packed in standard containers."

powers. In the present case, we are not dealing with goods unfit for human consumption, and there is no suggestion whatever that Appellee is packing or shipping any such product. We are dealing here with an absolute prohibition of the transport of Appellee's products across the state line into California even though wholesome, uncontaminated and, as Appellant himself has admitted, of a superior quality among cantaloupes. Moreover, it is a product which has undergone an inspection by Appellant's own inspectors at the field and which has been certificated by Appellant himself for the boundary crossing, after which it is subjected to a rigid inspection by the California inspectors (Stip., App. 38). The *Sligh* case did not involve any question, such as here, whether the State of Florida could require that the packing operation be performed in that State, in packing sheds constructed in that state.[11]

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[11] At page 30 of his Brief, Appellant asserts:

"If Florida, in 1915 . . . can prevent the shipment of immature citrus fruits in interstate commerce, then Arizona, in 1968, can surely prescribe standards of quality, appearance, packing and marketability for cantaloupes to be shipped in interstate commerce . . ."

Apart from the fact that the Florida statute related only to quality and not to appearance or packing at all, Appellant is here posing an issue which is not an issue in this case. Whether Appellants' conclusion follows from his premise, whether Arizona may or may not prescribe standards of quality, etc., is not the issue here. This case proceeds on the basis that Arizona does have standards of quality, standards of inspection, standards for containers, etc., and we are not here challenging these standards or the standardization law as such. We are merely challenging a particular application of the law. We are questioning whether under color of the Arizona law, the Appellant may say to a producer: "You may not process or pack your produce in our sister state where you have your facilities for doing so. You must do it here, or you can let your produce rot." This, we submit, the Supreme Court has clearly and unmistakeably declared, in the cases cited by us, to be violative of constitutional rights. See comments of Court below. Transcript of Proceedings, November 15, 1968, pp. 56, 57.

Appellant also refers to the case of *Pacific States Box & Basket Co.*, 296 U.S. 176 (1935) (Brief, p. 29). That case involved merely the question whether the State of Oregon could prescribe containers to be used for strawberries and raspberries *when packed in the State of Oregon.* The complainant was an out-of-state manufacturer of containers which did not conform to Oregon's standards. He wanted to sell his containers in Oregon. Oregon did not prohibit him from transporting his containers into the state or from selling them there, but merely did not allow the containers to be used in Oregon for raspberries and strawberries. The manufacturer was challenging the Oregon law, contending that his containers should be permitted for use in connection with these commodities. For reasons indicated in the Court's opinion, the Court concluded that the Oregon requirement was justifiable. *The case did not involve the question whether the state could require that strawberries and raspberries be packed in the State of Oregon, as a condition to shipment out of the state.* The state statute made no such requirement, and the case did not involve the question whether the state, by statute or by interpretation of the Director of Agriculture, could prohibit the transportation of strawberries and raspberries out of the state for packing elsewhere. This is amply clear from the opinion of the Court, 296 U.S. 176, at p. 184:

> "The order . . . is aimed, not at the importation or sale of other types of containers, *but at their use in Oregon by packers of raspberries and strawberries,* and the later transportation and sale of the packages. The prohibition of other types involved in prescribing the standard is nondiscriminating. It applies regardless of the origin of the containers. *The plantiff is a*

> *manufacturer of containers, not a packer or shipper of berries.* It is not prohibited from shipping its tin-top containers into Oregon; nor from selling them there . . ." (Italics supplied.)

The *Pacific States Box & Basket Co.* case has no application to the issues before this Court, and we would assume it was because of a realization of this that Appellant, who has been aware of its existence all along, did not see fit to make any reference whatever to this case in his Jurisdictional Statement.[12]

We respectfully submit that the cases relied upon by Appellant afford no basis for a finding that the burden imposed by Appellant's order in the present case is a reasonable one.

We respectfully submit the unanimous Court below was correct in finding that the present case fell clearly within the principles and precedents of this Court exemplified by the *Toomer v. Witsell* case, the *Haydel* cases, the *Schafer* case and the *Lemke* case.

In the case of *Dean Milk Company v. City of Madison, Wis.*, 340 U.S. 349 (1951), where the Supreme Court declared invalid a city ordinance prohibiting sale of milk unless bottled within five miles of the City of Madison, the Court stated:

> "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, ..." (*Id.* at 354)

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[12]The case was cited by Appellant in his Reply Brief in the Court below, but on a wholly different point, namely the question of federal pre-emption.

So here, to require under the circumstances of this case that Appellee construct and maintain processing and packing facilities in Arizona as a condition to sending its products into the stream of commerce would amount to "erecting an economic barrier" in violation of the Commerce Clause.

3. Appellant's order is designed fundamentally to serve local economic interests rather than public health and safety, and the burden imposed by such order upon interstate commerce cannot be justified as an exercise of the police power of the state.

It is Appellant's contention that his order constitutes "a valid and permissible exercise of the police power reserved to the State of Arizona . . . ." (Stip., App. 43).

It is clear that the claimed police power does not relate to the public health and safety. The Standardization Act of Arizona, unlike that of California, does not declare its purpose and objective as being related to the protection of public health or safety. (Compare California Agricultural Code, Section 3 and Arizona Fruit & Vegetable Standardization Act, Ch. 95, Section 2—both cited in the Supplement hereto.)

Furthermore, it is difficult to see how the prohibition which Appellant seeks to impose upon Appellee here can be related to protection of the public health or safety. It is apparent that the product involved here is going *out* of the State of Arizona, not coming into the State of Arizona. It would not be a sufficient answer to refer to the *Sligh* case, because, as we have pointed out, that involved a statute making it a criminal offense to handle within the state citrus fruits unfit for human consumption and injurious to health, whereas here we are dealing with

an express prohibition from interstate transport of fruits which are admittedly wholesome, uncontaminated and, indeed, of a superior quality—unless first packed in Arizona.

Indeed, Appellant makes no claim in his brief that the order has any relationship to the public health or safety. As Judge Merrill suggested at the hearing on the permanent injunction (Transcript of Proceedings, November 15, 1968, pp. 71, 72, 79), any such claim could hardly be supported in view of the state's exemption from the law of a variety of situations which would permit sale of poor grades of fruit within the state. Thus, Section 3-503C of the Standardization Act of Arizona exempts from the requirements of that provision "Any retail sales directly to a consumer" (the Court below suggested even at "roadside stands"); there are also exempted cantaloupes to be "used for charitable purposes or unemployment relief"; also, cantaloupes to be used "by the United States Government or its agencies." How such uninhibited use can be reconciled with any objective for protection of public health and safety is difficult to understand. The situation prescribed here is therefore basically different from that of the *Sligh* case.[13]

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[13]Even where laws profess to be health measures, they may be held invalid where they are not essential for such protection but have the effect of burdening interstate commerce. In the *Dean Milk* case, 340 U.S. *supra*, at 356, the Supreme Court said:

> "To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented the regulation must yield to the principle that 'one state in its dealings with another may not place itself in a position of economic isolation.'"

It is apparent that the basic objectives sought to be achieved by Appellant's threatened acts are not related to the public health or safety but are rather economic.[14] Appellant, in the Stipulation of Facts, has indicated his understanding of the objective of the framers of the Arizona law to be "to promote and develop Arizona fruits and vegetables in interstate and foreign commerce and to enhance *the return* to the producers of fruits and vegetables within this State." (Stip., App. 28) (Italics supplied).[15]

In his Brief (p. 56), Appellant speaks of the purpose in terms of enhancement of the "reputation" of Arizona fruits and vegetables and deemphasizes the stipulated understanding as to enhancement of "the return" to the producers of fruits and vegetables within the state. He speaks of the objective of the law as being "to assure that Arizona produce . . . will be identified as Arizona produce" (Brief, p. 21), that cantaloupes going out of Arizona will be "ambassadors of good will" for which Arizona would receive credit (Transcript of Proceedings, November 15, 1968, pp. 45, 79), that "It is within Arizona's legitimate interest to require that interstate can-

[14]Certainly, the objective of state legislation is not to be measured solely by its "stated" purpose. It would surely not be contended that a state could effect a permissible burden on interstate commerce merely by adopting language expressive of an appropriate police power although its fundamental purpose is economic.

[15]At the hearing on the permanent injunction, however, counsel for Appellant stated (Transcript of Proceedings, November 15, 1968, p. 44, L. 24—p. 45, L. 6) that the purpose "is not to protect the consumer . . . . the purpose of this act is to enhance the *reputation* of Arizona fruits and vegetables, in order to enhance *the return* . . . ." (italics supplied).

taloupe purchasers be informed that this high quality Parker fruit was grown in Arizona" (Brief, p. 43).[16] But however the proposition might be phrased, it is clear the basic objective and purpose of the law, as understood by Appellant, is economic.[17]

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[16]At page 79, L. 18, Judge Merrill summarized Appellant's position as follows:

> Judge Merrill: . . . Here, the only problem it seems to me, is that you are not getting credit for good fruit that is sold outside of the state, and this good fruit is not serving the state as an ambassador, that you have got a right to insist that it do.
>
> Mr. Lee: That's correct.
>
> Judge Merrill: You've got a sort of a long arm that reaches out and says, "Give me credit."

As to this theory, Judge Merrill remarked: (p. 81, L. 16-23):

> "I ask the question, whether you have a sufficient interest to be able to insist that fruit grown in the state always act as an ambassador to the state. This is an interesting concept, I must say, that you have a sort of a state property right in all fruit grown in the state, that you can insist that it draw credit for its origin. This is a distinction beyond anything we have in law so far."

The Court pointed out the weaknesses of such a theory from the standpoint of practical experience apart from the legal aspects, as, for example, the fact that inspection for quality is only a "spot check" at best, a sampling procedure merely, since it is not possible to look at every single cantaloupe; also the difficulty of preventing deterioration en route or to assure that the cantaloupes will arrive in good condition. The Court characterized this line of argument as equivalent to saying that "to insure that the oranges are mature or fit for consumption, you have to pack them in the state!" (Transcript of Proceedings, November 15, 1968, pp. 39, 64, 69)

Appellant asserts that cantaloupes not packed in Arizona "would not be identified as Arizona cantaloupes, but would bear the name and address of their California packer" (Brief, p. 21, footnote 7). But if this is so, we cannot see how Arizona's reputation could be hurt by inferior fruit packed out of state. As expressed by Judge Merrill (p. 81, L. 10):

> "if it is not packed in Arizona and it doesn't bear your label, then it is not a reflection on Arizona fruit."

[17]In a footnote on page 5, Appellant sets forth statistics stated to have been compiled by the United States Department of Agriculture with reference to "dollar value" of fruits and vegetables. These were never offered in evidence at any stage of the pro-

The Supreme Court has consistently held that advancement of local economic interests cannot serve as a basis for impeding the free flow of interstate commerce. ***Dean***

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ceedings. They do not form any part of the Stipulation of Facts and constitute no part of the record in this case, nor are they proper subject of judicial notice. Their significance in relation to types of crops, volume, prevailing market conditions, etc., is not indicated. If Appellant's object in making this citation of statistics is to support his statement that the produce industry is one of the leading industries of Arizona, this is a statement with which we would certainly not take issue.

Further statistics are set forth by Appellant as to "prices commanded" by cantaloupes grown in certain Arizona, California and Texas districts on three given dates in 1969 (see Brief, p. 7, footnote 3). This is stated to be for the purpose of emphasizing "the effectiveness of standardization laws in preserving the reputation of a state's produce." It is asserted that whereas Arizona and California have such acts, Texas does not, and the effect of this is supposed to be reflected in the prices at which they were sold in New York City. The statistics are stated to have been based only on "Random Samples of reports of the United States Department of Agriculture's Fresh Fruit and Vegetable Federal-State Market News." As in the case of the other statistics referred to, these reports were never offered in evidence at any stage of the proceedings. The statistics do not form any part of the Stipulation of Facts and constitute no part of the record in this case, nor are they proper subject of judicial notice. Their significance in relation to type of cantaloupe, quality, grade, quantity, prevailing market conditions at point of sale, and other factors affecting price is not indicated. Actually, the comparison is not apt at all, because reference to the Market News report for 6-9-69 shows that the high and low figures given for California and Arizona cantaloupes is for the *best* quality cantaloupes, whereas the figures shown for Texas cantaloupes starts with the *fair* quality at $5.50. The range of the better quality is actually $9.00-$10.00. This shows that on the better quality, there is not a great deal of variation. The same applies to the figures for 6-16-69, when better quality in Texas brought $6.50-$8.00, fairly comparative. It was only the "poor condition" that was as low as $2.00.

If one could justifiably draw any conclusions from these statistics, they would tend to prove our point that there is a very close parallel between the practices, standards and procedures of Arizona and California, and that at least on two of these dates selected, California brought higher prices than Arizona for cantaloupes of comparable quality. The fact is, however, that the Arizona and California product is considered in the trade of a

Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951); *H. P. Hood and Sons v. DuMond*, 336 U.S. 525 (1949); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Foster-Fountain Packing Co. Inc., v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928).

In *H. P. Hood and Sons v. DuMond*, 336 U.S. 525, (1949), this Court said:

> ". . . . it is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests, that are in question here. . . ." (*Id.* at p. 530)
>
> "The state may not promote its own economic advantages by curtailment or burdening of interstate commerce." (*Id.* at 532)

And in *Baldwin v. Seelig*, 294 U.S. 511 at 522, 524 (1935) the Court said:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. . . . If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

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superior quality to that of the Texas variety, and there is no indication that the standardization laws are a material factor at all.

Appellant's attempt to advance statistics such as the above demonstrates that the act in question has fundamentally an economic purpose, so far as Appellant's understanding goes.

"The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. Nebbia v. New York, 291 U.S. 502, 78 L. ed. 940, 54 S.Ct. 505, 89 A.L.R. 1469, supra. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

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"Whatever relation there may be between earnings and sanitation is too remote and indirect to justify

> obstructions to the normal flow of commerce in its movement between states. Cf. Asbell v. Kansas, 209 U.S. 251, 256, 52 L. ed. 778, 781, 28 S. Ct. 485, 14 Ann. Cas. 1101; Hannibal & St. J. R. Co. v. Husen, 95 U.S. 465, 472, 24 L. ed. 527, 530."

It was the above principle which guided this Court in the *Toomer v. Witsell* and *Haydel* cases.

The question here is not whether protection of local industry is a "proper" or "improper" purpose, or whether it is or is not a lawful purpose, as Appellant suggests (Brief, pp. 34, 35, 36, 37, 38).[18]

The question is rather how far a state may go in imposing burdens upon interstate commerce in the interest of protecting local industry.[19] As applied to the present case,

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[18]Appellant makes the statement (Brief, p. 6) that "growers in Arizona found that it was *impossible* to establish a reputation for quality produce in isolation from the reputation of 'Arizona produce' generally" (italics supplied.) This is a patent overstatement. It is supported neither by history, experience, nor fact. It is certainly not supported by the Stipulation of Facts. (See App. 28)

As for Appellant's statement (Brief, p. 7), referring to testimony which would be given by Mr. O. D. Miller, if called to testify, to the effect that the Arizona Act "has been successful in achieving its purpose," we would point out, first, such success has been achieved under circumstances permitting Appellee and various other shippers over the years to do their packing in California; and, second, to point out again that we are not seeking to invalidate the Arizona Act as such but are challenging a particular application and interpretation of the Act by the Supervisor.

[19]Thus, the three-judge Court below inquired whether it was Appellant's position that the California wine industry, for example, could obtain state legislation which would prohibit bulk shipment of wine and require that all wine be bottled in California "and show on the label that it was California wine?"; or that a state could require that all wheat be packaged into bread before shipping it in interstate commerce so that it could be labeled as a product of the state; or that Arizona, for example, could require that its fine long staple cotton be milled and

we respectfully submit the answer is to be found in the decisions referred to above. These decisions rest on the basic principle that preservation of free movement of goods across the Nation is a paramount concern. We are not 50 separate and independent countries. We are separate and independent states of one Union. Both the courts and Congress, through various enactments over the years, have recognized that the borders between the states must not be barricaded to commerce among them. Is it reasonable to say that a grower may not cross the state line to do in a neighbor state what he would do in respect of interstate commerce in his state of origin?

At p. 35 of his Brief, Appellant appears to concede that the state may not require a grower to construct a packing shed in the state. Yet that is the necessary effect of his order, as we have already shown, and under the cases cited, it is invalid. Appellant refers (Brief, pp. 36, 37) to "facts judicially known or proved" as superseding the legislative act. We respectfully submit ample facts are to be found here in the record before the Court, including Appellant's own unavoidable admissions concerning the effect of his order.[20]

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woven into cloth or fabrics before it could be shipped in interstate commerce so that it would be "labeled as Arizona grown long staple cotton"; (Transcript of Proceedings, November 15, 1968, pp. 51-54.)

In considering such questions, the court is not indulging in a legislative judgment or reviewing the wisdom of a law, as suggested by Appellant (see, for example, his Brief, p. 36). Evaluation of the wisdom of a law and the evaluation of its effect in terms of the burden cast upon interstate commerce are two different things, as the cases cited by Appellant himself clearly show. See, for example, the *Southern Pacific Company v. Arizona* and *Bibb v. Navajo Freight Lines, Inc.* cases.

[20]In neither the case of *Brotherhood of Locomotive Firemen and Enginemen v. Chicago R. I. & P. R. Co.*, 393 U.S. 129

4. Any interest the State of Arizona may have in the quality of Appellee's crops is adequately protected by the necessity of conforming to the equally as stringent, if not more stringent, requirements of Arizona's sister state, the State of California, as well as by other alternative methods available to Appellant.

Even if local economic or other interests are entitled to protection here, the furtherance of such interests does not require the prohibition sought to be imposed by Appellant.

As the facts show, Appellee's cantaloupes, after having undergone an inspection at the field by Arizona inspectors, undergo a thorough inspection by inspectors of the State of California after their arrival at Blythe. In many instances, there is also a federal inspection. The processing and packing operation is carried out in the same manner as is followed by Appellee in respect of its cantaloupe crops at Yuma, using similar equipment and methods. The conditions and standards under which the work is accomplished are the same in both States, and the containers used are identical.[20a] The standardization laws themselves parallel one another very closely. As Mr. Gipe has testified, the California inspection is as stringent, if not more so, than that of the State of Arizona.

(1968) nor the case of *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936), cited by Appellant on pp. 36 and 37 of his Brief, were there involved facts such as in the present case, where the effect of State action was to require the complainant to perform, in the state, operations he wished to perform in a sister state. In the *Brotherhood* case, there was involved a state statute specifying the minimum number of persons in a train crew in the state, and in the *Bayside* case, at issue was a state law regulating the manufacture of fish flour in the state.

[20a]If any further specification on the container as to source should be desired, for purposes of identification, this may be accomplished by simpler measures than by resort to the drastic action proposed by Appellant.

The Supreme Court has declared that a State law imposing restrictions on interstate commerce is rendered all the more unreasonable if there exist reasonable nondiscriminatory alternatives. Thus, in *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349 at page 354 (1951), the Court said:

> "This [discriminatory action] it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." [Bracketed matter supplied]

We respectfully submit the application to Appellee's cantaloupes of California's comparable standards and procedures affords the State of Arizona adequate assurance within the meaning and spirit of the above principle. Clearly, any objective to prevent deceptive packs or arrangements is fully satisfied by compliance with the California requirements. The agricultural departments of California and Arizona, by virtue of their strong common interests, have a close working relationship. It would be a simple matter to arrange, if desired by Arizona, for a certificate to be delivered to the Arizona authority attesting to the fact that the product has been processed and packed in conformity with California requirements. Such certificate, or other satisfactory device, should reasonably satisfy the local interests of Arizona in respect of packing standards, including nondeceptive packs.[21] An ar-

[21]At page 40 of his brief, Appellant cites a few language "differences" in the two state laws, but it is apparent these are of no practical consequence. As Mr. Gipe testified, the workers and inspectors all go about their work in the identical way,

rangement of a similar nature was suggested by the Court in the *Dean Milk Company* case, *supra* at pages 355, 356. As we have seen, there is already a California inspector on the Arizona side of the line, and a procedure for certificates of clearance of the border crossing is already in effect.

If it is the desire of the State of Arizona to make inspection of its own, as suggested in Appellant's brief (page 41), it is free to adopt measures appropriate to that end which do not unduly burden interstate commerce as here. Appellant contends his inspection can be made only in a packing shed and nowhere else. As we have shown above, the record of this case does not support such a contention.

Indeed, Appellant's position is hardly supported by the Statute of Arizona itself, which provides (Section 3-486):

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whether they are on the Arizona side or the California side, the California inspection being possibly more stringent.

The differences in packing to which he refers (Brief, pages 41, 44) are not differences in the law, or differences which an inspector could enforce, but simply *individual differences* of particular growers in the manner of packing within the permissible standards. (Depo., David Gipe, June 6, 1968, pages 56, 62.)

At page 41 of his Brief, Appellant attributes to Mr. Pike testimony to the effect "that the enforcement of statutory standards by one group or another group of inspection officers can result in appreciable differences." (Depo. L. J. Pike, June 6, 1968, p. 12, L. 10-16). The record does not justify this statement at all. The question put to Mr. Pike by his counsel was: "Does it make a difference, for example, who *supervises* the packing in these containers?" (italics supplied). To this question Mr. Pike replied "Certainly." Clearly, the *supervising* of the packing is not performed by the inspectors, but by plant personnel. The inspectors do not direct or supervise plant personnel or plant operations but merely observe and make spot checks. Company supervisors may, of course, apply individual differences within the range of permissible standards, and it must be assumed that this is the sense in which the question was understood by Mr. Pike.

"Section 3-486. Supervisor; inspection powers

A. The supervisor may enter and inspect every place or vehicle within the state where fruits and vegetables are produced, received, packed, delivered, loaded, shipped, offered for sale or sold for interstate shipment, and inspect fruits, vegetables and containers found therein.

B. He shall have the same powers in the performance of his duties as other peace officers, and may, while exercising such police powers, seize or hold as evidence the part of a pack, load, lot, consignment or shipment of fruits or vegetables packed, delivered for shipment, loaded, shipped, being transported, offered for sale or sold in violation of this article, as in his judgment may be necessary to secure the conviction of the party he knows or has good reason to believe is violating any provision of this article."

Very clearly the law itself contemplates that Appellant is not limited to a packing shed in carrying out any inspection. He may enter and inspect "every place or vehicle" and at any stage, that is to say, when "produced, received, packed, delivered, loaded, shipped, offered for sale or sold." He has the whole gamut of stages and operations available to him. As the evidence shows, he does in fact already make an inspection at the time the fruit is loaded into the trailer for transport to Blythe and he issues a certificate of clearance at the time.

In this regard, Judge Merrill inquired as follows of counsel for Appellant at the Hearing of November 15, 1968, Transcript, page 49, lines 2-6:

"Judge Merrill: It is possible in the field to determine whether the cantaloupes are edible?

Mr. Lee: That is correct.

Judge Merrill: And this can be done . . .
Mr. Lee: This can be done."

All this is wholly apart from the fact that any grower and shipper who wants to stay in business under today's highly competitive standards and practices must, of necessity, see to it that his product is of good quality and is suitably and properly packed. If he is to maintain his reputation in the trade, he must, in his own economic self-interest, maintain a high quality pack. We are dealing here with a product of a highly perishable nature, one which is not susceptible of storage. It is a product which is subject to inspection by the buyer or his representative at the site. Obviously, under such conditions, entirely apart from the requirements of the law, the product must measure up if it is going to sell. As Mr. Gipe stated, "These buyers inspect the product." (Depo., David Gipe, June 6, 1968, page 29, lines 23-26.)

We respectfully submit, under the circumstances which prevail here, no detriment accrues to the interest of the State of Arizona. Indeed, Appellant himself has admitted that the State would suffer no damage or detriment, so far as standards of packing are concerned, if Appellee were permitted by order of Court to do so at Blythe (Depo., L. J. Pike, June 5, 1968, p. 59, L. 5-20).

5. Appellant's long continued practice of permitting packing across the line in California emphasizes the unreasonableness of his present order.

As previously shown, it was in the light of the long-standing practice of packing at Blythe, publicly and officially recognized by Appellant in his annual reports extending over many years, and indeed participated in by

him, that Appellee undertook to institute and develop a cantaloupe crop program as an integral part of its general program for development of the Indian lands.

Appellant refers to his long-continued approval of, and participation in, this practice as "past lapses" (Brief, pp. 38-39). In both his Jurisdictional Statement (pp. 7-8) and in his Brief (p. 39), Appellant attempts to explain his permission of across-the-line packing in the many years prior to 1968 by arguing that this was illegality of a low-grade sort, whereas the across-the-line packing contemplated by Appellee in 1968 would have represented illegality of a high-grade sort, and consequently he had to take action. In his Jurisdiction Statement (pp. 7-8) he said:

> "Even after the 1965 amendment, the appellant has allowed small amounts of cantaloupes to be shipped out of the State in bulk, and therefore not in 'closed standard containers approved by the supervisor.' The appellee itself was permitted to ship in bulk 400 acres of cantaloupes harvested from its Parker ranch in 1967. Stipulation, Exhibit B. Aside from this shipment, however, all of the shipments in violation of the 1965 amendment to the Act were by small shippers and in comparatively insignificant amounts. *Ibid.*"

And in his Brief (p. 39):

> "Shipments in violation of the Act have been comparatively small and, with the exception of the Appellee, none have been by a major shipper."[22]

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[22]On page 38, as well as on page 8, of his Brief, Appellant refers to a 1965 amendment in the Arizona Act. He refers to Sec. 3-503C, which provides that cantaloupes be packed in "closed standard containers approved by the supervisor." Then

This argument certainly does not commend itself to reason, and, we respectfully submit, is hardly the kind of argument which can have much appeal to this Court. In point of fact, the amount of cantaloupes shipped in years prior to 1968 across the State line was not at all insignificant. As Appellant's own official reports will show, they were quite comparable to the volume of shipments in 1968, but this is entirely beside the point, because if an act is illegal, it is illegal regardless of its size or scope. If it is illegal to transport 500 acres of cantaloupes across the State line into California for processing and packing, it is equally illegal to transport 300 acres or 200 acres or 100 acres.

We would rather suggest, as we did in the Court below, that Appellant's practice of permitting interstate shipments in years prior to that here in question was

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he goes on to say that prior to 1965, Sec. 3-503G provided that "No containers are established for unpacked or loose cantaloupes."

From a reading of this, one might draw the conclusion that there was no standard container requirement in the law prior to 1965. That is not the case at all, however. Prior to 1965 the standard containers were expressly described and established in the law itself. Sec. 3-503D set forth the express dimensions of each type of container, depth, width and outside length. All the 1965 amendment did was to provide greater flexibility by permitting the Supervisor to approve the containers without having to go to the Legislature for each change.

As for the deletion of Section 3-503G, "No containers are established for unpacked or loose cantaloupes," this too effected no change in the existing law. Prior to 1965 as well as after, the law contained a section relating to packing, sale or delivery within the state (Section 3-482A) and providing for products which could be handled unpacked or in bulk (Section 3-518). Obviously the containerization provisions would have no application to products which could be handled loose, in bulk, unpacked, and Section 3-503G was superfluous.

Thus, in terms of the question presented in this case, the 1965 Amendment is without significance at all.

entirely legal, and his interpretation of the statute to permit such interstate transport was lawful and proper. We submit this long-continued practice of the administrative officer charged with administration of the law should be given effect in this case. We submit this is called for under Appellant's own line of argument on page 13 of his Jurisdictional Statement, where he said:

> "In the instant case, the governing rule of statutory interpretation is that which prescribes that 'When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agencies charged with its administration.' *Udall v. Tallman*, 380 U.S. 1, 16 (1965). *Udall v. Tallman* arose in the context of a federal statute, but the principle is equally applicable to interpretation of state statutes, particularly where upsetting the administrative officer's interpretation is potentially as disruptive as in the instant case."

With this principle we agree. It is to be applied, however, with respect to the statutory interpretation which the Administrator has applied consistently and uniformly over a period of years, not to an interpretation which represents a sudden, abrupt, and arbitrary switch from the long-continued practice and interpretation upon which he has caused interested parties to rely.

Appellant cites the case of *Lassen v. Arizona*, 385 U.S. 458 (1967). This was a case in which the State of Arizona had been taking property rights without compensation, and on behalf of the State it was argued this had been its practice for many years. The Supreme Court held, in effect, that a state can acquire no vested right to take

property without proper compensation merely because it continues to do so for many years. No one would question this result. The significant thing for us is that the State of Arizona in that case was seeking to rely upon its own *self-serving* practice over the years. In the present case, contrariwise, Appellant as representative of the state is seeking to *rid himself* of the consequences of his long-continued practice of interpretation and application of the law. The Supreme Court in *Lassen* was not disposed to permit the State to benefit from its own wrongful conduct and thereby to perpetuate a wrong.

We respectfully submit that Appellant's long-continued application of the law is not without significance in this case and is not "irrelevant" as he contends (Brief, p. 38), but is very meaningful in terms of the proper application of the law. We submit Appellant's past action was consistent with a proper interpretation and application of the law in light of constitutional requirements and he has no cause to stultify himself in relation to his past conduct.

Appellant asserts he might have done differently "had he been properly advised" (Brief, p. 38). Are we to understand from this that Appellant has been wrongfully advised in the past, or that he has not been advised at all? His practice was a matter of public record each year, so that we must reasonably assume knowledge thereof was had by the law officers and other public officials of the State of Arizona, as well as the public generally. We submit, however, this merely reflects the general acceptance of the propriety of the practice, and there is no cause for Appellant to demean himself or the conduct of the legal representatives of the State of Arizona.

III

THE THREATENED ACTION OF APPELLANT IS CONTRARY TO THE INTENT OF CONGRESS AS EXPRESSED IN FEDERAL ENACTMENTS REGULATING INTERSTATE COMMERCE IN AGRICULTURAL PRODUCTS, AND IS, THEREFORE, INVALID UNDER THE SUPREMACY CLAUSE[23]

Under the supremacy clause of the Constitution, Article VI, it has been the long established rule that where the Federal government has entered a field which is subject to its control, as for example, interstate commerce, the states may not thereafter enforce their own statutes or regulations in a manner which is contrary to or will defeat the objectives of the Federal plan. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Hill v. State of Florida*, 325 U.S. 538 (1945). In the *Hill* case, this Court held that even in the absence of a direct conflict between the federal enactment and the state action, the latter cannot be upheld where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (325 U.S., *supra*, at p. 542)

The Federal plan and purpose in respect of agricultural products, which provide the food and fibres which sustain the Nation, are unmistakably clear.

The Congress of the United States has adopted a series of enactments which have direct application to fruits and vegetables in interstate commerce. Among these are the Agricultural Adjustment Act, 50 Stat. 246, Title 7, U.S. Code, Sections 601 et seq.; Agricultural Marketing

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[23]This was one of the grounds upon which Appellee relied in the Court below. The Court did not find it necessary to review this issue, having reached the conclusion that Appellant's action would be violative of the commerce clause. We consider the issue of such weight as to merit the Court's consideration on this appeal.

Act of 1946, 60 Stat. 1087, Title 7, U.S. Code, Sections 1621 et seq.; Standard Container Act of March 4, 1915, Ch. 158, 38 Stat. 1186, 1187, Title 15, U.S. Code, Sections 234-236;[24] and Perishable Agricultural Commodities Act of June 10, 1930, 46 Stat. 531, Title 7, U.S. Code, Sections 499a et seq.

In the Agricultural Adjustment Act, *supra,* Title 7, U.S. Code, Section 601, the Congress has made the following declaration of conditions:

> "It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs purchasing power of farms and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce."

Further, at Title 7, U.S. Code, Section 602:

> "It is declared to be the policy of Congress . . . (3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to

[24]In 1968, Congress enacted Public Law 90-628 (82 Stat. 1320), which repealed certain standard container acts, namely those of 1916 and 1928 relating to certain types of baskets and other containers, and at the same time made certain amendments to the "Fair Packaging and Labeling Act" of 1966 (80 Stat. 1296; 15 U.S.C. 1451) on the basis that "With the enactment of this section, there will then be no question that containers now subject to the two Standard Container Acts will not be exempt from regulation under the Fair Packaging and Labeling Act": and that "The safeguards contained in the Federal Food, Drug and Cosmetic Act and the Fair Packaging and Labeling Act are adequate to provide this needed protection." See legislative history, contained in "Explanation of The Bill", in House Report No. 1107, Congressional Record, Vol. 114 (1968), as reprinted in 3 U.S. Code Congressional and Administrative News, pages 4462 and 4463, 90th Congress, 2nd Session 1968.

establish and maintain such container and pack requirements provided in Section 608c(6)(H) of this title, such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in Section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest."

In the Agricultural Marketing Act of 1946, Title 7, U.S. Code, Section 1621, the Congress expressed its intent to provide for an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aides and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced, and that the price spread between the producer and consumer may be narrowed.

By the same Act, the Secretary of Agriculture was directed to determine the best methods of processing, preparation for market, packaging, handling, transporting, storing, distributing and marketing agricultural products. (7 U.S.C. Sec. 1622(a)); to assist in the development and establishment of more efficient marketing methods, practices and facilities for the purpose of bringing about more efficient and orderly marketing, and reducing the price spread between the producer and the consumer (7 U.S.C. Sec. 1622(b)); to develop and improve standards of quality, condition, quantity, grade and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial

practices (7 U.S.C. Sec. 1622(c)); to conduct, assist, foster, and direct studies and informational programs designed to eliminate artificial barriers to the free movement of agricultural products (7 U.S.C. Sec. 1622(b)); to inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe (7 U.S.C. Sec. 1622(h)); and to determine the needs and develop or assist in the development of plans for efficient facilities and methods of operating such facilities for the proper assembly, processing, transportation, storage, distribution and handling of agricultural products (7 U.S.C. Sec. 1622(i)).

The Perishable Agricultural Commodities Act is an act designed to protect the producers of perishable agricultural products, by setting up a system of federal licensing for persons handling such products as dealers, brokers, commission merchants, and setting up standards and procedures with respect to inspection, sale, shipment, condition, grade, quality, size, weight, pack etc. As stated in *Zwick v. Freeman,* 373 F.2d 110, at 116 (C.C.A. N.Y. 1967), the federal Act was enacted to provide "a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive," and should have the benefit of federal protection.

The provisions cited above give clear evidence of the national interest, as declared by the Congress of the United States, to remove impediments to the free flow of agricultural commodities to market and to improve the

efficiency of facilities and methods for processing agricultural commodities in preparation for their shipment to market. The interpretation of the Arizona law which Appellant is seeking to enforce is directly contrary to these objectives, since it would have the effect of preventing Appellee from improving the efficiency of its facilities and processes for handling its crops and would directly impede the interstate transportation of its crops.

Pursuant to the authority conferred upon him by the above enactments, the Secretary of Agriculture has promulgated a series of regulations which relate to such matters as inspection, certification and standards for fresh fruits and vegetables, including standards for grades of cantaloupes. (CFR, Title 7, Subtitle B, Ch. I, Subch. C. Part 51). At page 7 of his Brief, Appellant himself refers to various marketing orders for fruits and vegetables promulgated by the Department of Agriculture in carrying out the purpose and intent of the above laws to achieve uniformity among the states. Thus, the regulations referred to by Appellant himself relate to fixing of size, capacity, weight, dimensions, markings, and pack of containers which may be used in packaging or handling of various fruits, such as pears, nectarines and prunes.

Indeed, the Arizona law itself provides, in Section 3-499F, that "Nothing in this article shall be construed to conflict with any state or federal law or regulation regarding net weight markings on containers or subcontainers."

Under the Perishable Agricultural Commodities Act, the Secretary of Agriculture has promulgated an exten-

sive body of rules and regulations governing sales and purchases, and handling, of agricultural commodities (C FR, Title 7, Part 46).

It is clear, we submit, that the Congress of the United States has evinced a deep concern over the maintenance of a free and unimpeded flow of fruit and vegetable commodities in interstate commerce; further, that it has occupied the field to such a degree and with such unmistakable emphasis as to preclude any state action which would arrest the movement of such commodities at its borders unless first packed in the state.

As stated in *H. P. Hood and Sons v. DuMond,* 336 U.S. *supra,* at 543:

> "When it is considered that the Federal Act was passed expressly to overcome disruption of the orderly exchange of commodities in interstate commerce and conditions found to burden and obstruct the normal channels of interstate commerce, 7 U.S.C. section 601 . . ., it seems clear that we cannot sustain the State's argument that its restrictions here involved supplement and further the Federal scheme." *Id.* at 543.

IV

APPELLANT'S CONTENTIONS CONCERNING EFFECT OF DISTRICT COURT'S DECISION ON ENFORCEMENT OF ARIZONA LAW AND ON "STANDARDIZATION LAWS" IN GENERAL ARE WITHOUT BASIS.

At pages 11 and 12 of his Jurisdictional Statement, Appellant states that "The district court has necessarily held that where enforcement of a state's agricultural standardization laws would be impossible without requir-

ing possible expenditures of money by certain farming corporations, enforcement of standardization laws under such circumstances is unconstitutional," and that "the lower court's holding has cast a shadow not only over the enforcement proccedures of Arizona's Standardization Act, but also over those of all other states which have adopted standardization laws in an attempt to enhance the long-run reputation of their states' produce." In his Brief, pages 7 and 8, Appellant states that the "holding of the lower court that a state is powerless to prevent the shipment of its produce which does not conform to standards of quality and pack prescribed by that state's statutes casts serious doubt on the constitutionality of the enforcement of standardization laws in all states." Appellant cites references to the laws of 17 states having "some type of" standardization law. (Brief, p. 44, fn. 10)

The suggestion that the Court below held to the effect stated by Appellant, we respectfully submit, is a distortion of the District Court's opinion.

It has never been contended by us at any point in these proceedings, nor has the three-judge District Court below held, that the standardization law of Arizona, as such, is unconstitutional or invalid, or that the State of Arizona is not entitled to enforce its standardization law, or is not entitled to enforce its standardization law with its own inspectors.

Appellant asserts, as though it were a point of dispute, that "it is within Arizona's constitutional authority to enact a standardization law for fruits and vegetables. It necessarily follows that Arizona has the authority to enforce that law." (Brief, p. 43). We have never taken issue

with these propositions, nor has the Court below questioned them.

The law of Arizona, its provisions, standards and requirements, we submit, are entitled to full enforcement by the State of Arizona *as to all packing operations which take place in the state.* Appellee has for many years operated a packing shed at Yuma, Arizona, where it has packed its Yuma cantaloupes, among other commodities, and, in connection with such operations, Appellee has at all times been unquestionably subject to the standards and inspection procedures and requirements set up by the Arizona law.

But, the question here, as indicated by the Court below, is simply *whether the State of Arizona can require that the packing operations be performed in the state.*

This is the sole issue here, and the three-judge Court below held that in forbidding Appellee to take cantaloupes out of the state without first packing them in Arizona, Appellant, as Supervisor of Inspection, was going too far.

The Court below stated that "A reading of the Act reveals no clear basis nor authority for the issuance of the order by the defendant" and what was in question was "the construction placed upon that Act by the Superintendent and the constitutionality of the order issued by him pursuant to his construction." (App. 62) So far as the Act itself is concerned, it contains no express provision that packing shall, or must, be done in the State of Arizona. It addresses itself to operations and activities, including packing, when they take place in the State of Arizona. Indeed, certain statements of Appellant himself indicate that this must necessarily be so. For example, on

page 22 of his Brief, Appellant states that "It is immaterial to the appellant when or where the cantaloupes are packed . . ." and further "It is immaterial to the appellant whether the appellee packs its cantaloupes in or out of a packing shed." This would suggest the view that the Arizona Act does not, in terms, contain any provision specifying where the packing *must* be performed, and nowhere in Appellant's argument is there any suggestion that the Act, in terms, does this.[25] Indeed a simple reading of the Act would indicate that it addresses itself to packing when performed in the State. Section 3-482, relating to containers, on its face refers to packing "in this state." Even Section 3-499 of the Arizona law, the section relating to "name of the orchard or farm on containers", to which Appellant makes reference on page 43 of his Brief, clearly applies to cases where the product is packed in the state. That section calls for the name of the packer "together with a sufficient address to permit ready location of the packer," presumably for enforcement purposes rather than "credit" purposes, as suggested. Obviously, the address in question must have reference to an address within the state. This is corroborated by Appellant himself, on page 43, where he contends

[25]Appellant asserts that the statute of Arizona does not in terms require Appellee to construct a packing shed in Arizona. At the same time, based on his premise that it is only in the packing shed that he can make an inspection of the cantaloupes, Appellant must acknowledge, as we have already shown, that Appellee must establish a packing shed and facilities at Parker, Arizona, if it is to be permitted to ship its cantaloupes out of the state. Thus, Appellant is, in effect, saying: "The law of Arizona does not in terms require it, but I am interpreting the law so as to require that you do your packing in Arizona and that you build a packing shed here. However, since the law does not in terms require it, you have no grounds for complaint."

that a provision in almost identical terms in California would call for a California address.[26]

We submit, therefore, that there is no basis whatever for Appellant's contention that enforcement of the state's agricultural standardization laws would become "impossible" as a result of the District Court's decision. As for the District Court's ruling "casting doubt" upon laws of other states, we respectfully submit Appellant is attempting to raise issues were none actually exist. It is not quite clear what the necessary implications of the expressions "casting a shadow" or "casting doubt" are. However, it is amply clear no basis for the statement exists. The Court below did not have before it the laws of these other states (with the exception of California, where the packing in this case was accomplished). The laws of these other states were not in issue. These laws did not enter into the pleadings. They were not subject of discussion or mention in the Stipulation of Facts. There was no showing of any kind in the Court below what the terms and provisions of these laws are, their purpose, scope, or intent. There was no showing at all as to the interpretation or application of any such "standardization law" (or what a so-called "standardization law" is) in terms of shipments out of state in interstate commerce or how they would be interpreted or applied to facts and circum-

[26]In its Opinion and Order, the District Court on its own initiative considered the matter of abstention and concluded "We do not believe the instant case an appropriate one to invoke the abstention doctrine" (App. 60-61). This has not been raised as an issue at any stage of the proceedings, and in his Jurisdictional Statement (p. 13, fn. 4), Appellant states "At this stage of the proceedings, we do not feel that abstention should now be an issue."

stances such as exist here. Actually, it would appear that these laws are not being interpreted to apply to interstate shipments at all. The Illinois statute, for example, expressly so provides, thus giving recognition, in statutory form, to the proposition enunciated by the three-judge Court in this case:

> "No provision of this Act shall apply or be deemed to apply to foreign or interstate commerce excepting insofar as may be permitted by the constitution of the United States, the Acts of Congress and the treaties made thereunder, nor to transactions subject to the provisions of the 'Perishable Agricultural Commodities Act, 1930.'' § 161, Chapter 5, Smith-Hurd Illinois Annotated Statutes (1966).

For other examples, see § 2314, Title 15, Burns Indiana Statutes (1964); and § 5-5-1, Title 5, Utah Code (1953).

The fact is that neither party considered these "other" laws relevant to the issues tried and heard by the Court below, and they were not involved in any way. No mention of any such laws was made except for the general passing reference in Appellant's Brief in the Court below, repeated in the Jurisdictional Statement and now here again.

To argue that the decision of the Court below "has cast a shadow" on these "other" statutes is, we submit, without foundation.

Appellant's contention that these "other" laws (which includes California) have relevance here is most difficult to reconcile with the position taken by Appellant below, both at the hearing and in briefs, that the law of Cali-

fornia, which closely parallels the law of Arizona, was totally irrelevant to the issues. Indeed, this position is expressed also in the Jurisdictional Statement, where Appellant finds it fits in with his then line of argument: "The existence or non-existence and similarity or lack of similarity of a standardization law in California are therefore irrelevant" (footnote, p. 25).

If the law of California, after which the Arizona law "was patterned" (Appellant's Jurisdictional Statement, p. 12) is irrelevant, what possible relevance can the laws of the other states have?[27]

We respectfully submit, the laws of the "other" states have no bearing upon the issues before this Court.[28]

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[27]Possibly because of this dilemma, Appellant in his present Brief has changed his position regarding the relevance of the California law. At page 40, he says: "The existence of standardization acts in California and other states is relevant . . ."

[28]Although they are not involved, we have nevertheless investigated the laws of the 16 states besides California cited by Appellant. We find, first of all, that Appellant's references are not to "standardization" laws as such, but to the entire body of state statutes relating to agriculture in most of the named states. For example, Florida Statutes Annotated, Title 33, and Idaho Code, Title 22, relate to "Agriculture, Horticulture and Animal Husbandry". Smith-Hurd Illinois Annotated Statutes, Chapter 5, Burns Indiana Statutes, Title 15, and Tennessee Code, Title 43, deal with "Agriculture and Horticulture".

Although each of the cited statutes is of a similarly broad scope, composed of many chapters and subchapters covering diverse subjects related to agriculture, our research shows that many of them do not include anything which could be properly classified as a "standardization act" similar to or even comparable to the Arizona Fruit and Vegetable Standardization Act. No "standardization" provisions at all were found in the cited statutes of Indiana, Iowa, Tennessee or Wyoming.

Although the remaining statutes cited did contain some provisions of a "standardization" type, they have special provisions which on their face raise serious question whether they would have any application under facts such as we have here. Indeed,

Appellant argues (Brief, p. 36) that "it is impossible to determine from the lower court's cryptic opinion the basis for its constitutional holding. . . ." Similarly in his Jurisdictional Statement seeking review of the District Court's decision, Appellant argued that the District Court's decision is "cryptic" (Jurisditional Statement, p. 25), "cryptic in the extreme" (p. 12) and "devoid of any discussion" (*id.*, p. 21)—as though a court is constrained to embody its views in opinions of a length and scope satisfactory to the litigants. Not only are these criticisms unfounded, but they ignore the fact that the Court's decision was based upon a detailed Stipulation of Facts drawn up by the parties themselves and came after a full and complete hearing in which the Court went into the many aspects of the case—law and facts—with counsel. (See Transcript of Proceedings, November 15, 1968).

Appellant complains that the Court's decision is "*completely* devoid of any reasoning or guidelines" which the Appellant might use as the basis for determining how he might properly "go about protecting his interests" (Jurisdictional Statement, p. 25), when it is commonly known and understood that the Court's function is to decide cases, not to instruct the administrator of a law what course of action he should pursue to achieve the objects and purposes of the law. Actually, the District Court's

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as noted in the text above, certain statutes contain express provisions to the effect that they have no application to produce in interstate commerce.

In *none* of the cited statutes of these 16 other states was there found any requirement that produce grown in the state be packed in standard containers in a packing facility within the state, before being transported out of the state.

decision here does not preclude Appellant from utilizing any means of carrying out appropriate inspections desired by him which will not constitute an undue burden upon interstate commerce. Appellant is already carrying out inspections in the field, and various other procedures discussed during the course of the proceedings and known to Appellant are available.

Appellant complains further that the Court's decision "is not the product of skill in the law of the State of Arizona" (Jurisdictional Statement, p. 13). By what process of reasoning Appellant is able to make such an assertion is not at all clear when it is considered that the panel of three judges consists of men who literally grew up among the farms and packing houses of Arizona and California; who, as practitioners before the Bars of Arizona, California and the federal courts, acquired a close familiarity with the laws of those jurisdictions; who, as such practitioners, unquestionably had to deal with the problems of the farmers among whom they lived, and with farming practices and farming methods; and who, in their careers and capacities as judges, have undoubtedly devoted much of their time and thought to matters relating to farmers and farming. Indeed, we can conceive of no circumstance which could more effectively clothe the judicial authority with skill and expertise in this field. We respectfully submit this intimate understanding of the practical and legal aspects of the subject matter is clearly reflected in the questions and remarks of the three judges at both hearings. (See Transcript of Proceedings, June 7, 1968, and Transcript of Proceedings, November 15, 1968.)

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the three-judge District Court below finds ample support in the facts and law of the case and should be sustained.

Dated, Salinas, California,
December 22, 1969.

Respectfully submitted,
JACOB ABRAMSON,
Attorney for Appellee.

EVANS, KITCHEL & JENCKES,
ABRAMSON & CHURCH,
Of Counsel.

(Supplement Follows)

SUPPLEMENT

Comparison of Laws of Arizona and California

Arizona Fruit & Vegetable Standardization Act	California Agricultural Code
LEGISLATIVE PURPOSES	
To promote the development of the izona fruit and vegetable industry, prevent fraud and deception in the eiving, packing, marking, shipping, signment, sale, and accounting of es of fruits and vegetables for in- state and foreign commerce, there hereby established certain standards d certain standard containers for rious fruits and vegetables; and to ovide for the regular and orderly forcement of the provisions of this certain regulations for the licen- g and bonding of farm produce alers shipping fruits and vegetables fected by the standardization provi- ns of this act from the state of izona, are hereby established, and a nalty prescribed for the violation of provisions thereof. (1929 Session ws of Arizona, Chapter 95, Section page 307)	§ 3. It is hereby declared, as a matter of legislative determination, that the provisions of this code are enacted in the exercise of the power of this state for the purposes of promoting and protecting the agricultural industry of the state and for the protection of the public health, safety, and welfare.
SCOPE	
3-482. Scope of article; containers A. All fresh fruits and vegetables, hen being packed, after packing, hen delivered for shipment, loaded, ipped, being transported, offered for le or sold in this state, for which ades, standards and standard con- iners are established in this article, all come within the meaning of this rticle. B. All lots of fruits and vegetables acked for sale, offered for sale, trans- orted for sale or sold in this state all be packed in new or clean con- iners. izona Revised Statutes, Title 3, Article 4)	§ 43451. Scope of Chapter This chapter, among other things, establishes standard containers for the fruits, nuts, and vegetables for which standard packs are established by this division, when such fruits, nuts, and vegetables are being packed or placed in any container, or after packing, or when delivered for shipment, loaded, shipped, being transported, or sold in any container. (Division 17, Fruit, Nut and Vegetable Standards, Chapter 4, Containers)

Arizona Fruit & Vegetable Standardization Act

California Agricultural Co

DEFINITIONS

Deceptive Arrangement

§ 3-481.

7. "Deceptive arrangement" or "deceptive display" means a bulk load, arrangement or display of fruits or vegetables which has in the outer layer, or exposed portion, fruits or vegetables which are so superior in quality, size or condition to any of those which are concealed, or the unexposed portion, as to materially misrepresent any of the lot.

§ 42508. Deceptive arrangeme ceptive display

"Deceptive arrangement" or " tive display" of fresh or dried nuts, or vegetables means any b or load, arrangement, or disp such products which has in posed surface, fresh or dried nuts, or vegetables which are perior in quality, size, condition any other respect so superior t which are concealed, or the un portion, as to materially misre any part of the bulk lot or lo

Deceptive Pack

§ 3-481.

8. "Deceptive pack" means a container of fruits or vegetables which has in the outer layer or an exposed surface, fruits or vegetables which are so superior in quality, size or condition to those in the interior of the container, or the unexposed portion, as to materially misrepresent the entire content.

§ 42509.

"Deceptive pack" means a tainer or subcontainer which ha outer layer or any exposed fruits, nuts, or vegetables wh in quality, size, condition, or other respect so superior to t the interior of the container container or in the unexposed as to materially misrepresent t tents. Such pack is deceptive outer or exposed surface is c of products whose size is not a ate representation of the varia size of the products in the ent tainer, even though the fruits, vegetables in the container ar ally uniform in size or comply specific commodity size varia quirements of this part.

Arizona Fruit & Vegetable Standardization Act	California Agricultural Code
Pack	
481. 4. "Pack," "packing" or "packed" ans the regular compact arrange- nt of all or part of the fruit and etables in a container or subcon- ner used for the purpose of sale transportation.	§ 42516. "Pack," "packing," or "packed" means the regular compact arrangement of all or part of the fruit or vegetables in any container or subcontainer.

Arizona Fruit & Vegetable Standardization Act

California Agricultural Code

STANDARD CONTAINERS; PACK—CANTALOUPES

§ 3-503.

C . . . . All cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the supervisor. Except as follows:

1. Cantaloupes to be used for charitable purposes or unemployment relief, or by the United States government or its agencies.

2. Any retail sales directly to a consumer.

§ 45663. Method of Packing; exceptions

All cantaloupes shall be packed in regular compact arrangement in standard container number 39, 40, 41, 44, 44B, or 44D. All such containers shall be closed and, except as otherwise provided in Section 45664, the number of cantaloupes in each container shall be one of the "standard pack counts" which is listed in Section 45662 for each such container.

This section does not apply to sales of the following:

(a) Cantaloupes which are sold at a retail establishment in possession of the retailer for the purpose of resale directly to consumers.

(b) Cantaloupes which are sold by a producer regularly engaged in the production of cantaloupes directly to consumers on the premises where produced or at a retail stand operated by such producer near the point of production, which in no case shall be outside of the county in which the cantaloupes were produced.

Arizona Fruit & Vegetable Standardization Act

As used in this section "closed" idded", as applied to containers ntaloupes, means:

In the case of fiberboard con- rs that the opening is completely ed, except for necessary ventila- openings, with material of similar ty and strength to the adjoining on of the container.

In the case of nailed wooden, ound, or other containers, that percent or more of the opening vered with material similar to that in the construction of the sides bottom of such containers, se- y attached to the top.

California Agricultural Code

§ 45661. Closed

As used in this article, "closed' as applied to containers of cantaloupes means:

(a) In the case of fiberboard containers, that the opening is completely covered, except for necessary ventilation openings, with material of similar quality and strength to the adjoining portion of the container.

(b) In the case of nailed wooden, wirebound, or other containers, that 40 percent or more of the opening is covered with material similar to that used in the construction of the sides and bottom of the containers, securely attached to the top.

§ 45665. Uniformity of size and layer count

Cantaloupes which are packed shall be virtually uniform in size and there shall be approximately the same numerical count of uniformly sized cantaloupes in each layer throughout the container.

Arizona Fruit & Vegetable Standardization Act | **California Agricultural Code**

MARKINGS

§ 3-499.

A. All fruits and vegetables, when being packed or placed in a container, or after packing, or when delivered for shipment, loaded, shipped, or being transported, offered for sale or sold in bulk, or in a container or subcontainer, shall conform to this article.

B. Except as hereinafter specifically exempted, containers of fruits or vegetables, except subcontainers, shall bear in plain sight and in plain letters on the outside thereof the following:

1. Name of the orchard or farm where fruit or vegetable was produced.

2. The postoffice address of the producer, the name of the person who first packed or authorized the packing of the products or the name under which the packer is engaged in business, together with a sufficient address to permit ready location of the packer.

C. A subcontainer shall be exempt from the provisions regarding marking when the container in which they are packed is marked in compliance with the requirements of this article.

D. All markings required by this article, except net weight, shall be plainly and conspicuously stamped, stenciled, printed, labeled or branded on one end or side of each container.

E. No container or subcontainer of fruits or vegetables shall bear grade or other designations that are false or misleading. The repeated use of a container or subcontainer of fruits or vegetables bearing markings required by this article, or designations of

§ 43671. Place of markings on tainer; size of lettering; tion of display placard

If any markings are used, quired to be used by this divisi any container of any fruits, nut vegetables to describe the conte the container, such markings, wi exception of net weight, sha plainly and conspicuously m stamped, stenciled, printed, label branded on one end of each bo or carton, and either on one side top cover of each basket, barr other similar container.

The designation of grade sh stated in letters which are not les one-quarter of an inch in heig the marking is on a placard wh used in display, the placard sh placed or posted in such a positio there is no doubt as to the prod is to identify.

Arizona Fruit & Vegetable Standardization Act

California Agricultural Code

MARKINGS (Continued)

nds, quality or grade is prohibited
ess the markings which do not
perly and accurately apply to the
ducts repacked or replaced therein
first completely removed, erased or
terated.

. Nothing in this article shall be
strued to conflict with any state
federal law or regulation regarding
weight markings on containers or
containers.

503. . . .

C. All containers of cantaloupes
ll have appearing thereon, in plain
nt and in plain letters on one out-
e end, the name of the person who
packed or authorized the packing
the cantaloupes, or the name under
ich such packer is engaged in busi-
s, together with a sufficiently ex-
cit address to permit ready location
such packer. All cantaloupes shall
packed in regular compact arrange-
nt in closed standard containers ap-
oved by the supervisor. Except as
llows:

1. Cantaloupes to be used for
aritable purposes or unemployment
lief, or by the United States govern-
nt or its agencies.

2. Any retail sales directly to a
nsumer.

-503. . . .

E. In addition to the markings re-
ired by subsections B, C and D,
ction 3-499, each container of canta-
upes shall be conspicuously marked
letters not less than one-half of
e inch in height, stating the exact
mber of melons packed therein.

§ 45691. Packer's name and address

Every container of cantaloupes shall bear upon it in plain sight and in plain letters on one outside end, the name of the person that first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready location of such packer.

§ 45664. Smaller number in container; marking exact count

Notwithstanding the provisions of Sections 45633 and 45663, a smaller number of larger uniformly sized cantaloupes may be packed in standard container number 41 or 42 if the container is marked with the exact count of cantaloupes which it contains. Cantaloupes of the size 18 or larger also may be packed in containers numbers 44H, 44I, 44J, and 44K if the containers are marked with the exact number of cantaloupes contained therein.

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Arizona Fruit & Vegetable Standardization Act

California Agricultural Co

QUALITY STANDARDS

§ 3-503. CANTALOUPES; Definitions; Serious Damage; Standard Packs; Crate Markings; Irregular Sized Container; Exceptions

A. Cantaloupes, shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting, or other causes. Damage to any one cantaloupe is not serious unless it affects the edible portion or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof. Not more than ten percent, by count, of the cantaloupes in any one container may be below the foregoing requirements, but not to exceed one-half of this tolerance shall be allowed for any one cause. Cantaloupes packed in the standard containers shall be fairly uniform in size. All cantaloupes in each container shall be of one variety or of similar varietal characteristics.

B. "Mature", in the case of cantaloupes, means that the appearance of the outside indicates maturity and the arils which surround the seed during the development of maturity have been absorbed and, in addition, that the juice of the edible portion shall contain not less than eight percent soluble

§ 45601. Maturity and freedo defects

Cantaloupes shall be mature b overripe, not poorly netted an from any of the following defe

(a) Mold, decay, and insect which has penetrated or damag edible portion of the cantaloupe.

(b) Serious damage which to bruises, sunburn, growth cuts, sponginess, flabbiness, wilti other causes. Damage to any one loupe is not serious unless it the edible portion of the indi cantaloupe.

§ 45602. Mature

"Mature" in the case of a cant means that the cantaloupe co with all of the following require

(a) The appearance of the indicates maturity.

(b) The arils which surrou seed during development of m have been absorbed.

(c) The juice of the edible p contains not less than 8 percent solids as determined by the st hand refractometer.

§ 45603. Soluble solids of edib tion

The soluble solids content edible portion of cantaloupes s determined by extracting the from two plugs of the flesh, on each of opposite sides of the

Arizona Fruit & Vegetable Standardization Act

is as determined by the standard
d refractometer.

. .

California Agricultural Code

and taken at approximately one-half of the distance between the stem and blossom ends. The plugs shall be approximately one-half of an inch in diameter. The portion of the plug three-eighths of an inch from the outside edge of the rind shall not be included as the edible portion of the plug of flesh.

§ 45604. Tolerances

Not more than 10 percent, by count, of the cantaloupes in any one container or bulk lot may be below the requirements which are prescribed by this article, but not to exceed one-half of this tolerance shall be allowed for any one cause.

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Arizona Fruit & Vegetable Standardization Act

California Agricultural Code

EXEMPTIONS

§ 3-518.

This article shall not be construed to prevent a grower of fruits or vegetables in the state from selling or delivering his products unpacked and unmarked as a part of his crop in bulk to a packer in this state for grading, packing or storage, or to prevent a grower or packer from manufacturing the products into a by-product, or from selling the products unpacked or unmarked to a person engaged in the operation of a commercial by-products factory for the sole and express purpose of being used in the state in the manufacture of a by-product for resale.

§ 43251. Transportation for processing or disposal

Except as otherwise provided in tion 44008, fruits, nuts, and vege of the kinds which are specified in division, if they are not wrapped packed, are exempt from the stand which are established in this div when being transported or deliv to the destinations and for the poses herein set forth, or when pared, loaded, shipped, or sold u any of the following conditions:

(a) From a packing plant w does not have proper or adequate cilities for processing, grading, p ing, or reconditioning, to another p ing plant within the state which such facilities.

(b) To a byproduct plant wi the state for commercial proces preserving, or manufacture of products for resale. Dates, how

are not exempt from the standards which are established by Chapter 20 (commencing with Section 47401) of this division, except while they are being transported or delivered to a distillery for the manufacture of brandy or alcohol or to any person for the production of any product which is not for human consumption.

(c) To a feed yard within the state for livestock feeding purposes.

(d) To a dumping ground or waste disposal plant within the state for disposal.

(e) From the orchard or field where they were produced to a packing plant within the state for first processing, grading, or packing.

Arizona Fruit & Vegetable Standardization Act | **California Agricultural Code**

ENFORCEMENT

Inspection Powers

§ 3-486. Supervisor; inspection powers

A. The supervisor may enter and inspect every place or vehicle within the state where fruits and vegetables are produced, received, packed, delivered, loaded, shipped, offered for sale or sold for interstate shipment, and inspect fruits, vegetables and containers found therein.

XII.

§ 42821. Authority to enter, in and take samples

An enforcing officer may enter inspect any place or conveyance w the county or district over whic has jurisdiction, where any fres dried fruits, nuts or vegetables produced, stored, packed, delivered shipment, loaded, shipped, being t ported, or sold.

He may inspect all fresh or fruits, nuts, and vegetables and containers and equipment found i such place or conveyance. He may take for inspection, such represent samples of the produce and such tainers, as may be necessary to mine whether or not this divisio been violated and may subject samples of produce to any meth inspection or testing.

Seizure of Evidence

§ 3-486.

B. He shall have the same powers in the performance of his duties as other peace officers, and may, while exercising such police powers, seize or hold as evidence the part of a pack, load, lot, consignment or shipment of fruits or vegetables packed, delivered for shipment, loaded, shipped, being transported, offered for sale or sold in violation of this article, as in his judgment may be necessary to secure the conviction of the party he knows or has good reason to believe is violating any provision of this article.

§ 42823.

Any enforcing officer may, whi forcing this division, seize and as evidence all or any part o pack, load, bulk lot, consignme shipment of fresh or dried fruits, or vegetables which is packed, del for shipment, loaded, shipped, or transported, or sold in violation division, or any container of product, as may in his judgme necessary to secure the convicti the party he knows or believe violated or is violating any pr of this devision.

Arizona Fruit & Vegetable Standardization Act

California Agricultural Code

Violations

3-522.

A. It is unlawful for any person to ct as commission merchant, broker or gent without a valid license, or for ny commission merchant or agent to:

1. Impose false charges for han-ling or performing any service in con-ection with the handling of farm roducts.

2. Intentionally make false or mis-eading statements as to market con-itions.

3. Make fictitious sales or conspire o defraud the producer.

4. Change the lot number of a con-ignment or the serial number of the ar used in the transportation thereof ith intent to defraud.

5. Directly or indirectly purchase or his own account goods received pon consignment without prior au-hority from the consignor, or fail romptly to notify the consignor of the urchase of his own account.

6. Intentionally make a false state-ent as to the grade, condition, mark-gs, quality or quantity of products, owever shipped or packed.

B. It is also unlawful:

1. To pack, cause to be packed, sell, ffer for sale, deliver for shipment, oad, ship or transport for shipment ny fruits or vegetables which do not onform to the requirements of this rticle.

2. To prepare, deliver for shipment, oad, ship, transport, offer for sale or ell for shipment, a deceptive pack, oad, arrangement or display of fruits r vegetables, or to mislabel any con-ainer or display of the fruits or vege-ables.

C. A person violating a provision f this section, or a provision of this rticle other than provided in this is guilty of a misdemeanor.

§ 42941. Nonconforming products

It is unlawful for any person to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported, or sell any fruits, nuts, or vegetables in bulk, or in any container or subcontainer, unless such fruits, nuts, and vegetables, and their containers, conform to the provisions of this division.

§ 42942. Deceptive pack or lot

It is unlawful for any person to prepare, pack, place, deliver for shipment, load, ship, transport, or sell a deceptive pack, bulk lot, bulk load, load, arrangement, or display of fresh or dried fruits, nuts, or vegetables.

XIII.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

BRUCE CHURCH, INC., a California corporation,
Appellee.

On Appeal From the United States District Court for the District of Arizona.

BRIEF OF WESTERN GROWERS ASSOCIATION AS AMICUS CURIAE.

By Leave of this Court, Western Growers Association files this Brief as *amicus curiae.*

Interest of the Amicus Curiae.

Western Growers Association is a non-profit trade association composed of growers and shippers of vegetables and melons in the States of California and Arizona and whose members produce 80% of the vegetables and melons grown in those States. One of the primary objects of the Association has been and now is to support and advance the Standardization Acts of both

these States. The fact that these two States produce more than 49% of the total volume of these commodities grown in the United States and the fact that they can market more than 50% of their production East of the Mississippi, during a part of the year competing directly with "home grown" vegetables and melons, is at least partially due to the enactment and enforcement in Arizona and in California of high standards for culling, grading, sizing, and packing of these products which protect the consumer and enhance the reputation of these States for quality vegetables and melons.[1] These standards that have been in effect for more than a generation are placed in jeopardy by the decision of the Court below.[2]

Summary of Argument.

(1) State Standardization Acts for fruits and vegetables have a reasonable relation to a legitimate purpose to be accomplished by a state and as such constitute a valid exercise of the police power. State Standardization Laws for fruits and vegetables have been among the

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[1]Fresh Fruit and Vegetable Shipments, Calendar Year 1968 Consumer and Marketing Service, U.S. Dept. of Argiculture. Fruit and Vegetable Division, Market News Branch.

[2]The present California Fruit, Nut, and Vegetable Standardization Act was enacted by California Statutes of 1931 Chapter 703. Prior to that, California had various Standardization Acts for fruits and vegetables enacted 1901, 1903, 1915, 1917, and 1927. The legislative purpose of the present 1931 Act is to prevent fraud and deception and to protect the general welfare by establishing standards and standard containers and to regulate the packing, marketing, and disposal of fruits, nuts and vegetables.

earliest and most common exertions of the police power by the various states and over the years the valid scope of these regulations have been much extended. *Pacific States Box & Basket Co. v. White,* 296 U.S. 176 (1935); *Turner v. Maryland,* 107 U.S. 38, 51-54 (1883). Regulations within the range of the police power cannot be declared invalid unless it can be said that they bear no reasonable relation to a legitimate purpose to be accomplished by their enactment. *Sligh v. Kirkwood,* 237 U.S. 52 (1915).

(2) State Standardization Acts which regulate the quality of fruit and vegetables marketed in and from their state of origin and the containers in which they are to be shipped do not improperly burden interstate commerce. They constitute proper local regulations which a State may enact unless and until Congress exercises its authority on the subject. "This subject has been so frequently dealt with in decisions of this Court that an extended review of the authorities is unnecessary." *Sligh v. Kirkwood, supra.* Ever since *Willson v. Blackbird Creek Marsh Co.,* 2 Pet. 245 and *Cooley v. Board of Port Wardens,* 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation, in the absence of congressional action, has for the most

part been left to the states by the decisions of the United States Supreme Court. *South Carolina State Highway Department v. Barnwell,* 303 U.S. 177, 185 (1938).

(3) The requirement that the cantaloupes be packed in closed standard containers is an essential part of a Standardization Act. If cantaloupes are shipped out of the State, loose and in bulk, as they come from the field, the State not only loses its ability to enforce packing standards but also its ability to enforce quality standards.

(4) The cases relied upon by Appellee are restricted to either (a) statutes or regulations nominally of local concern but in point of fact aimed at interstate commerce or (b) statutes or regulations having no reasonable relation to a legitimate purpose to be accomplished by this enactment or (c) cases in which the Federal Government has preempted the field.

ARGUMENT.

I.

The Act and the Order of the Supervisor of Inspections Thereunder Is a Valid Exercise of the Police Power of the State.

In *Pacific States Box & Basket Co. v. White,* 296 U.S. 176 (1935), an action was brought in Federal District Court to enjoin an order of the Department of Agriculture of the State of Oregon entitled: "Standard Containers For Fruits and Vegetables". Justice Brandeis, in speaking for a unanimous Court, states:

> "First. The power of a state to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition, is conceded. Such regulation of trade is a part of the inspection law; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See *Turner vs. Maryland,* 107 U.S. 38, 51-54.[3] Latterly, with the broadening of the fields of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended." (Page 181 of the Opinion).

In that case, the plaintiff did not question the reasonableness of the standard so far as it prescribed the capacity of the box or basket but challenged the fixing of

[3] *Turner v. Maryland* cites in footnotes four pages of state statutes regulating the form, capacity, dimensions and weights of containers in which articles of commerce must be packed and sold.

the dimensions and the form of the container. This Court, nevertheless, sustained the power of the State to regulate this.

In *Pacific States Box & Basket Co.* case, this Court also emphasized the presumption in favor of the validity of such legislative action, stating:

> "The order here in question deals with a subject clearly within the scope of the police power. When such legislative action is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. *Borden Farm Products Co., Inc. vs. Baldwin,* 293 U.S. 194, 209." (Page 185 of Opinion).

Finally, in the *Pacific States Box & Basket Co.* case, this Court held that the same presumption of validity which attaches to the acts of the legislature also attaches to the acts of the person delegated authority to make regulations or orders thereunder:

> "But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of the administrative bodies." (Page 186 of Opinion).[4]

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[4]In the Statute before the Court in this matter the Statute, itself, requires the containers to be closed and delegates to the Supervisor the approval of containers to be used.

In *Sigh v. Kirkwood,* 237 U.S. 52 (1915) this Court held:

> "Furthermore, this regulation cannot be declared invalid if within the range of the police power unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment." (page 61 of Opinion).

Applying the law in the above cases to the facts in the case now before the Court, the conclusion cannot be escaped that a standardization act regulating the quality, pack, and container for fruits and vegetables is within the basic police power of the State, that it is presumed to be enacted for a legitimate purpose and that this presumption attaches to the regulations and orders issued thereunder. The burden is upon the person attacking the act or order to show that it is arbitrary or not designed to achieve a legitimate purpose of the State.

The police power of the State is not limited to the protection of public health, morals, and safety. The exercise of the power may include legislation to develop the resources of the State and add to its welfare and prosperity. *Sligh v. Kirkwood, supra,* at page 59; *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422 (1936).

In *Bayside Fish Flour Co. v. Gentry, supra,* a California corporation was engaged in the manufacture of fish flour from sardines. It sought to enjoin a State law which prohibited the reduction of edible portions of sardines to fish flour. This Court held:

> "If the enforcement of the Act affects interstate commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The

provisions of the act assailed are well within the police power of the state, as frequently decided by this and other Courts." (Opinion Page 426).

This Court stated, in the *Bayside Fish Flour Co.* case that "Appellant places great reliance upon *Foster Packing Co. v. Haydel,* 278 U.S. 1". This Court, however, distinguished the *Foster Packing Co.* case, pointing out that while the ostensible purpose of the Louisiana Statute in that case was to conserve the raw shells for local use, such purpose was feigned and that the real purpose of the Statute was aimed at restricting interstate commerce.

II.

The Act and the Order of the Supervisor of Inspection Thereunder Do Not Improperly Burden Interstate Commerce.

This Court upheld the validity of the Florida Statute making unlawful the shipment of citrus fruits which are immature or unfit for consumption as early as 1915. *Sligh v. Kirkwood,* 273 U.S. 52 (1915). That case was an appeal from a criminal conviction for having delivered immature fruit for shipment in interstate commerce contrary to such Statute. Counsel for plaintiff in error argued (1) that the Act in question was not a justifiable exercise by the State of its police power and (2) the Act seeks to limit, regulate, and control interstate commerce and is directly in conflict with the Constitution of the United States. (Argument of counsel set forth in 59 L. ed. 836).

Basically, this Court, in that case, ruled as follows:

(1) A State may regulate the shipment in interstate commerce of citrus fruits which are immature

or unfit for consumption until Congress exercises its supreme authority over the subject;

(2) Such legislation is a valid exercise of the police power of the State.

(3) Such Act only incidentally and indirectly affects interstate commerce.

The Court first pointed out that Congress has the exclusive power to regulate interstate commerce and that when such authority is exerted, a state, even in the exercise of its police power, may not interfere with the supreme authority of Congress over the subject. (Page 58 of Opinion). The Court pointed out, however, that no Act of Congress had been called to its attention undertaking to regulate shipments of this character (Page 62 of Opinion). Similarly, in the instant case, if Congress should undertake to write an overall Standardization Act which preempted this field, such Act and the orders thereunder, so far as they pertain to cantaloupes destined for interstate commerce, would be exclusive. No such Act of Congress exists.

In the above case, this Court goes on to hold that while a state may not interfere with the supreme authority of Congress over the subject:

> "this Court from the beginning has recognized that there may be legitimate action by the state in the matter of local regulation, which the state may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary." (Page 58 of Opinion).

In *Sligh v. Kirkwood, supra,* this Court took judicial notice of the fact that the raising of citrus fruits is one

of the great industries of Florida and "that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market". (Page 61 of Opinion). Almost these identical words are applicable to the case now before this Court.[5]

In *Parker v. Brown,* 317 U.S. 361 (1943) an action was brought to restrain the enforcement, as to plaintiff, of a raisin marketing program adopted under the California Agricultural Prorate Act. A statutory three-judge district court enjoined the enforcement, as to plaintiff, of the prorate program and W. B. Parker, Director of Agriculture of the State of California, appealed therefrom to this Court. The primary question involved was whether the Act and the actions of the Director thereunder violate the Commerce Clause of the Constitution of the United States. (Argument of Appellant set forth in 87 L. ed. 319, 320).

In that case, Justice Stone, speaking for a unanimous Court, held:

> "This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholely withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken." (Page 360 of Opinion).

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[5]The value of vegetables and melons grown in the States of California and Arizona during the year 1967 was $479,644,000.00. *Agricultural Statistics 1968*, a publication issued by the U.S. Department of Agriculture, Table 224. The value of cantaloupes grown in the States of California and Arizona during the year 1967 was $52,535,400.00. This constituted 69.44% by value of all the cantaloupes grown in the United States idem. Table 241.

The Court, in that case, discussed and cited those cases in which the state power to act was not void when there is some manufacturing, even of slight extent, before the products enter interstate commerce. *Federal Compress & Warehouse Co. v. McLean,* 291 U.S. 17, 21, *Crescent Cotton Oil Co. v. Mississippi,* 257 U.S. 129. It cited as a similar case *Sligh v. Kirkwood, supra.* The case now before this Court may well come within the ambit of such decisions.

But the Court, in the *Parker* case, did not limit the validity of local regulations necessarily to situations in which there was some processing before the product goes in interstate commerce:

> "But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved." (Page 362 of Opinion).

This Court in the *Parker* case did not limit its decision to whether the burden upon interstate commerce was indirect rather than direct but went to basic criteria, stating that the regulations would be upheld as a proper exercise of the police power and not a burden upon interstate commerce if:

> "upon a consideration of all of the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health, and well being of local

communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause." (Opinion Pages 362 and 363).

In *South Carolina State Highway Department v. Barnwell,* 303 U.S. 177 (1938) an action was brought to enjoin the State Highway Department and others from enforcing a Statute imposing restrictions on the use of highways by certain types of trucks. The three-judge district court granted the injunction and this Court reversed. This Court pointed out that it had often sustained state weight limitations and highway limitations although such regulation has burdened or impeded interstate commerce. "But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of the legislative authority, which, under the Constitution, has been left to the states". (Page 189 of Opinion).

Thus, in the above case, this Court said that in reviewing the determination of the court below:

"We examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." (Opinion Pages 191 and 192).

III.

The Requirement That the Cantaloupes Be Packed in Closed Standard Containers Is an Essential Part of the Standardization Act.

The opinion of the Court below states that it was the intention of Appellee to harvest its melons in Arizona and haul them in bulk to California (Page 59 of Appendix). This violates an express provision of the Act which requires that all cantaloupes shall be packed in closed standard containers.[6]

The reason for this requirement is obvious and valid. Compliance with grade and quality standards for cantaloupes is required by the Act. For example, they must be mature, not overripe; they must be fairly well netted; free from mold, decay and insect damage which has penetrated the edible portion of the cantaloupes; and free from serious damage due to bruises, sunburn, growth cracks, etc.[7] There are further provisions regulating the number of cantaloupes in the container and what is to be marked on the container.[8] There would be no way of enforcing these provisions except as there are also enforceable provisions that the cantaloupes be marketed in closed standard containers.

Whether the cantaloupes are sold in intrastate or interstate commerce these same requirements apply. Whether the grower of the cantaloupes is a citizen of Arizona or of another State, or is an Arizona corporation or a foreign corporation, if the cantaloupes are grown in Arizona these same requirements apply. Each requirement constitutes a legislative judgment of stand-

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[6]Arizona Revised Statutes, Section 3-503, C.
[7]Arizona Revised Statutes, Section 3-503, A.
[8]Arizona Revised Statutes, Section 3-503, E.

ards that will promote public welfare and the general prosperity and welfare of the State. Each and every provision of the Act is adopted for this purpose. No part of it is discriminatory to non-citizens of Arizona; no part of it has an ulterior or feigned motive; no part of it is aimed at discouraging or burdening interstate commerce; and all of the Act applies equally to cantaloupes destined for intrastate and interstate commerce.

IV.

The Cases Relied Upon by Appellee and Cited by the Court Below Are Not Applicable.

It is our contention and belief that the cases cited by the Court below in support of its opinion "that the order complained of constitutes an unlawful burden upon interstate commerce", and those cases cited to the Court below by Appellee in support of that contention, are based on facts that do not exist in the instant case.

The Court below cited, in support of its decision, *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928) and *Johnson v. Haydel,* 278 U.S. 16 (1928) Appellee cited a similar case, *Toomer v. Witsel,* 334 U.S. 385 (1948), in support of the decision of the Court below.

In *Foster-Fountain Packing Co. v. Haydel, supra,* Appellants were engaged in the business of catching and canning shrimp for shipment and sale in interstate commerce and Appellees were public officials in Louisiana charged with the duty of enforcing an Act known as the "Shrimp Act". The Appellants contested the validity of the Act alleging that it was a burden upon interstate commerce. The Act declared all shrimp and parts thereof in Louisiana waters to be the prop-

erty of the state and specified that the person who lawfully takes shrimp from the waters is granted the right to sell it beyond the limits of the state "when the tail meat is removed within the state". Similarly, the Act provided that the raw shells and hulls may not be shipped out of the State until they are made into fertilizer or chicken feed. This Court, at page 10, held:

> "The facts alleged in the Complaint, the details set forth in the plaintiffs' affidavits and the provisions of the Act to be restrained show that the conservation of hulls and heads *is a feigned and not the real purpose.*" [Emphasis added].

Johnson v. Haydel, supra, involving the Louisiana Oyster Act, was a companion case where the same results were reached upon the same state of facts.

The Appellee in the Court below relied upon *Toomer v. Witsel, supra.* This was an action to enjoin as unconstitutional the enforcement of several South Carolina Statutes governing commercial shrimp fishing in the three-mile maritime belt off the coast of that State. The three-judge Federal District Court upheld the Statutes but on appeal this Court held the Statutes invalid. The fishery which South Carolina attempted to regulate by the Statutes in question was a part of a larger shrimp fishery extending from North Carolina to Florida and most of the shrimp were of a migratory type. South Carolina enacted several regulations in order to make the fishing off its waters easier for its citizens and aimed at citizens of other States that came within its waters.

One of these provisions was that the license fee for a South Carolina resident was $25 for each shrimp

boat but the license fee for a boat owned by a non-resident was $2500. While this particular provision of the Statute is not relevant to our case, it tends to show the overall purpose of the Statutes.

The portion of the Statute that has been cited to the court below provided that the shrimp boats fishing in the maritime belt off South Carolina were required to dock at a South Carolina port and unload, pack, and stamp their catch before shipping or transporting it to another State. The Court held that this imposed "an artificial rigidity on the economic pattern of the industry". (Opinion Pages 403 and 404).

Justice Rutledge, in a concurring opinion, noted:

> "The requirement that owners of boats fishing in the maritime belt dock at a South Carolina port, unload, pack, and stamp their catch (for tax purposes), before 'shipping or transporting it to another State' is not merely a regulation of commerce burdening it in the sense of materially increasing the shippers' costs. Many valid regulations of commerce do this. The regulation in question goes further. *It is aimed in terms directly at interstate commerce alone* and thus would seem to be discriminatory in intent and effect upon that commerce." (Opinion Pages 409 and 410) [Emphasis added].

The above-cited cases come within the exception to the general rule. The general rule is that a state Statute in the exercise of the police power of the state is a legislative judgment and is presumed to be valid unless, upon the whole record, it is found to be without rational basis. (*Pacific States Box & Basket Co. v. White,*

supra, and *South Carolina State Highway Department v. Barnwell Bros., supra*). The exception, set forth in the cases discussed above, is that the court may find that the purported reason for the Statute is feigned and that it is really aimed at interstate commerce.

The Court below also relied upon the cases of *Shafer v. Farmers' Grain Co.*, 268 U.S. 189 (1925) and *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922). These cases have already been distinguished by this Court in *Parker v. Brown*, 317 U.S. 361 (1943). In that case, in which the raisin marketing program of the State of California was upheld, this Court stated:

> "The regulation is thus applied to transactions wholely intrastate before the raisins are ready for shipment in interstate commerce."
>
> "It is for this reason that the present case is to be distinguished from *Lemke vs. Farmers' Grain Co.* and *Shafer vs. Farmers' Grain Co.* on which Appellee relies. There, the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of the opinion that the purchase of the wheat for shipment out of the state without resale or processing was a part of interstate commerce. Compare *Chassaniol vs. Greenwood, Supra.*" (Opinion Pages 361 and 362).

In addition, Appellee in the Court below relied upon *Baldwin v. Seelig, Inc.*, 294 U.S. 511 (1935) and *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964).

The *Baldwin* case involved the constitutionality of the New York Milk Control Act. The Act set up a

system of minimum prices to be paid by dealers to producers. It sought to apply this to purchases without the state, in this instance, in Vermont, by providing that "there shall be no sale within the state of milk bought outside unless the price paid to the producers was the one that would be lawful upon a like transaction within the state". While it was admitted that New York had no power to regulate the price paid for milk in Vermont, it was contended by the state that it could forbid the sale of that milk in New York if it was bought at a lower price outside the state. The Court states:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." (Page 521 of Opinion).

The Court pointed out that the:

> "avowed purpose of the obstruction as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." (Page 522 of Opinion).

Polar Ice Cream & Creamery Co. v. Andrews, supra, involved a situation in Florida where plaintiff purchased approximately 70% of its milk requirements from producers from other states than Florida. Under a three pronged regulatory structure of the Florida Milk Commission, plaintiff was required to accept its total supply of Class I milk, military milk aside, from designated Pensacola producers at a fixed price. As a result, it could not take this type of milk from producers in

other states. The Court held that this matter was controlled by the case of *Baldwin v. Seelig, supra,* and similar cases.

In summary, as to these two milk cases relied upon by Appellee, "the avowed purpose" as well as the necessary tendency of these Acts is to suppress or mitigate the consequences of competition between the States.

Basically, in determining whether the cases relied upon by Appellee are applicable to the instant case, this Court will have to determine whether the Statute and order in question have a reasonable relation to a legitimate purpose to be accomplished in their enactment or whether that purpose is feigned and its true purpose is to burden interstate commerce. *Bayside Fish Flour Co. v. Gentry, supra.* It is not enough to invalidate a statute to determine that a regulation incidentally affects interstate commerce when the object of the regulation is not to that end. *Sligh v. Kirkwood,* 237 U.S. 52, 60. Under the circumstances of this case, the legislation will be stricken down only if this Court finds that, upon the whole record, the legislative choice is without rational basis. *South Carolina State Highway Department v. Barnwell Bros.,* 303 U.S. 177, 191 and 192.

Conclusion.

Under point I, II, and IV of this Brief, we have discussed whether the Arizona Standardization Act and the order of the Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service con-

stituted (a) valid exercise of the police power of that State (b) not contrary to the Commerce Clause of the United States Constitution. In fact, these points are intertwined.

A summary of our position on these points of law is as follows:

(1) If any state of facts reasonably can be conceived that would sustain the validity of the Statute and the order by its enforcing officer, there is a presumption of the existence of those facts (*Pacific States Box & Basket Co. v. White, supra*).

(2) The determinaion of the legislature in enacting this legislation will not be set aside unless, upon the whole record, the legislative choice is without rational basis (*South Carolina State Highway Department v. Barnwell Bros., supra*).

(3) Conversely, this matter does not come within the cases relied upon by the court below or cited by the Appellee which hold that a regulation does not come within the range of the police power when it has no reasonable relation to a legitimate purpose to be accomplished in its enactment or where in fact its stated purpose is feigned (See *Sligh v. Kirkwood, supra,* at Page 61 of Opinion distinguishing such cases);

(4) The Court below, in its opinion, does not cite or rely upon any enunciation by Congress of a national policy as to the regulation of the quality or pack of fruits and vegetables and none exists (*Sligh v. Kirkwood, supra*).

(5) The Statute here involved applies to the requirements of further processing of the cantaloupes (sorting, grading, and packing) prior to their entering interstate commerce and as such the Statute is not for-

bidden by the United States Constitution (*Sligh v. Kirkwood, supra; Federal Compress & Warehouse Co. v. McLean, supra; Chassaniol v. City of Greenwood, Mississippi, supra*);

(6) Conversely, the statute does not come within the line of cases where the state statute takes effect at a time when no preshipment processing is to be performed (*Parker v. Brown, supra* at Pages 361 and 362 where such cases are distinguished).

(7) Notwithstanding the Commerce Clause of the Constitution, this Court has long recognized that states may, under a proper exercise of their police power, make regulations which unavoidably involve regulation of interstate commerce, but which because of their local character and their number and diversity are not and may never be fully dealt with by Congress (*South Carolina State Highway Department v. Barnwell Bros., supra*).

(8) Conversely, this matter does not come within the cases relied on by the court below or cited by Appellee in which the legislation, while nominally of local concern, is in point of fact aimed at interstate commerce and in fact discriminates against interstate commerce (*South Carolina State Highway Department v. Barnwell Bros., supra* at Page 186 where such cases are distinguished).

It is respectfully submitted that the judgment of the lower court should be reversed.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Most of the contentions and assertions contained in the appellee's brief have already been covered by our opening brief. This reply brief will be correspondingly limited.

I.

Several assertions advanced by the appellee would appear to question the legitimacy of the basic concept of standardization laws. Notwithstanding these assertions, it is quite clear that the appellee agrees that a state such as Arizona or California, for which the production of fruits and vegetables constitutes an im-

portant industry, has a legitimate interest in prescribing minimum standards of quality and pack for fruits and vegetables shipped from the state.[1]

It is further contended, however, that the Act at issue was "designed fundamentally to serve local economic interests . . ." (Appellee's brief, p. 75), in violation of the principle of *Toomer v. Witsell,* 334 U.S. 385 (1948), *Baldwin v. Seelig,* 294 U.S. 511 (1935), and similar cases.

The fundamental and overriding issue between the two parties has therefore been framed: What is the purpose of the Arizona Fruit and Standardization Law? Is its purpose to promote what the appellee apparently agrees are legitimate interests of the State of Arizona, to enhance the reputation of Arizona produce and enhance the return to Arizona growers? Or is its purpose one which is prohibited by the interstate commerce clause of the United States Constitution, to insulate a segment of Arizona's business from out-of-state competition?

A corollary issue involves the circumstances under which this Court will look behind the stated purpose of state legislation and reassess the factors which the State Legislature took into account. The cases supporting the principle that this Court will not ascribe an improper, invalidating purpose to state legislation so long as there is a reasonable basis for the stated purpose need not be reiterated here. (See pages 34-37 of appellant's opening brief).

Footnote 1

The appellee's brief, for example, contains the following statement at page 43:

> "We do not challenge the right of the State of Arizona to adopt a standardization law for fruits and vegetables or its right to enforce such a law."

Similarly, at the oral argument before the lower court at the preliminary injunction stage, counsel for the appellee stated candidly that "We believe the laws of Arizona in this regard [the standardization laws] are salutary laws." Reporter's Transcript of Proceedings on Plaintiff's Application for Preliminary Injunction, 30/2-3.

The appellee assumes that because the Act at issue has an economic objective, it is *ipso facto* invalid. In this regard, it is necessary to distinguish between the types of economic interests which a state may pursue—consistent with the commerce clause—and those which it may not. It is very clear that a state may not advance the economic interests of its own producers by isolating itself from out-of-state competition. As discussed in our opening brief, this is the principle of the *Baldwin v. Seelig*, *Toomer v. Witsell*, *Johnson v. Haydel*, and similar cases.

Those cases do not hold, however, that all economic objectives are constitutionally out of bounds. *Parker v. Brown*, 317 U.S. 341 (1943), for example, involved a challenge on commerce clause and other grounds to California's Agricultural Prorate Act, which controlled the quantity of raisins shipped from the State of California. This Court stated that "the declared purpose of the act is to 'conserve the agricultural wealth of the state' and 'to prevent economic waste in the marketing of agricultural crops' of the State." 317 U.S. at 346. It is obvious from reading the entire opinion in that case that the purpose of the quantity restrictions was to raise the price which could be realized by California raisin producers. If a state can constitutionally limit quantity of agricultural produce for the purpose of enhancing the return to its producers, quality and packing restrictions for the same purpose are similarly permissible.

The appellee's assertions notwithstanding, the basis for this Court's decision in *Sligh v. Kirkwood*, 237 U.S. 52 (1915), does not rest upon health considerations, but rather upon the economic impact of the challenged law to Florida citrus producers. In the language of this Court:

> The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose. Id. at 61-62.

The appellee correctly observes that Arizona's Fruit and Vegetable Standardization Act contains no express requirement that cantaloupes be packed in the State of Arizona. The reason is obvious. The concern of the Act is that the statutory standards—uniformity of size, absence of deceptive packs, uniformity of varietal characteristics, etc.—must be met. It is only because compliance with these standards can be determined only by inspection in the pack that the issue of where the cantaloupes are packed even arises. The adverse impact on the appellee's business is "incidental, indirect and beyond the purposes of the legislation." *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422, 426 (1936).

Thus, there is no dispute that the underlying objectives of the Act are economic. But they are not the improper economic objectives which the appellee would ascribe to the Act, objectives such as were involved in *Baldwin v. Seelig* and similar cases. The history of the Act, the undisputed testimony in the instant case (See page 35 of appellant's opening brief) and the holdings of this Court establish the propriety of the stated objectives.[2] Under such circumstances, this Court has made it very clear that it will not impute to the enacting legislature an improper, invalidating objective.

Footnote 2

Ironically, the appellee agrees that "the fact is . . . that the Arizona and California product is considered in the trade of a superior quality to that of the Texas variety. . . ." (Footnote 17, appellee's brief, pp. 79-80) The appellee's further assertion that "there is no indication that the standardization laws are a material factor at all" is of course without any basis. The assertion is opposed to the undisputed testimony of Mr. O. D. Miller and the appellant himself concerning the success which the standardization act has enjoyed, and is further refuted by the fact that a number of federal marketing orders have prescribed standard containers. In any event the fact — with which the appellee agrees — that of the three principal cantaloupe producing states, the two which have standardization acts enjoy the best reputation, certainly strengthens the conclusion that Arizona and California acted within their proper powers in enacting standardization laws.

II.

In further recognition of the propriety of the purposes of Arizona's Fruit and Vegetable Standardization Act, the appellee asserts that Arizona's interests can be vindicated by California inspectors applying California law. It is suggested, for example, that the State of Arizona could "arrange" to have California authorities deliver a certificate "attesting to the fact that the product has been processed and packed in conformity with California requirements." (Appellee's brief, p. 85.) In support of its contention that Arizona is constitutionally required to adopt this "reasonable alternative" the appellee relies upon *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951).

In the first place, there is nothing in the existing law of either Arizona or California assuring compliance with such a procedure. As a result, under this "reasonable alternative" Arizona would be dependent upon the day-to-day willingness of California officials to cooperate.

Even more important, packing "in conformity with California requirements" is not what the Arizona statutes require. Once it is recognized that Arizona has a legitimate interest in prescribing minimum standards of quality and pack, it follows ineluctably that Arizona is entitled to enforce its own standards through its own enforcement officers. Additional reasons why enforcement of Arizona's law by California inspectors is not constitutionally required are adequately developed in our opening brief, pages 39 through 43.

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), relied upon by the appellee, is instructive. In that case this Court invalidated a city ordinance prohibiting the sale of milk as pasteurized unless it had been processed and bottled at an approved pasteurization plant within a five mile radius from the central square of the City of Madison. The "reasonable and adequate alternative" relied upon by the majority opinion in that case was an inspection by the City's own inspectors of milk pasteurized

outside the statutorily prescribed area. The City could then prohibit any milk not approved by its inspectors from coming into the City. The dispositive difference between the *Dean Milk* case and the instant case is that the "reasonable alternative" in that case permitted the City to rely upon its own inspectors applying the City's own standards. Such a procedure was feasible because non-conforming milk could be prohibited from coming into the City. In the instant case, once the produce leaves the State of Arizona, Arizona's inspectors lose all control over it. Like *Sligh v. Kirkwood,* but unlike *Dean Milk,* this case involves regulation of products going out of the state rather than products coming into the state.

The appellee also suggest another alternative: Those cantaloupes which the shippers desire to ship from this state in closed standard containers approved by the supervisor will conform to the statutory standards. Those which the shipper elects to ship loose and in bulk need not conform. This proposal advocates a return to the same system which existed before enactment of the Standardization Act, a system under which some shippers maintain high standards and some do not. The fact that Bruce Church Inc. asserts that it will maintain the standards is beside the point. The fundamental premise of standardization laws is that the statutory standards are to be enforced as to all produce shpped from the state. Only by this means can the state eradicate the basic evil which led to the enactment of standardization laws.

The parties have stipulated that a fundamental objective of the California and Arizona standardization acts was to prevent deceptive packs. Appendix, pp. 42-43. The appellee has never denied that the prevention of deceptive packs — placing the higher quality fruit on the outstide of the pack so as to misrepresent the entire content of the pack — is a proper state function. It is impossible to perform this function unless the state's inspectors can inspect the pack. Similarly, the appellee's manager of Arizona operations, Mr. Gipe, testified to the importance of sorting for color, varietal characteristics, etc., Gipe Deposition 55/25-56/24.

His testimony bears out the fact that it is important to the reputaton of cantaloupes that all cantaloupes wihin a given pack be of similar color and varieal characteristics. It is impossible to assure that this will be done unless the state is permitted to inspect the packed produce.

III.

The appellee's pre-emption argument was not treated by our opening brief because it was not raised by the appellee's motion to dismiss. In any event, however, the argument is not well taken. *Florida Lime and Avocado Growers, Inc., v. Paul,* 373 U.S. 132 (1963), and *Parker v. Brown,* 317 U.S. 341 (1943).

The dispositive fact, pertinent to the pre-emption issue, is that there is no marketing order governing cantaloupes in Arizona. Under this Court's decision in *Florida Lime and Avocado Growers, Inc., v. Paul,* the presence of a marketing order does not necessarily pre-empt the state regulation; the issue is whether the federal regulation has in fact manifest an intent to occupy the field. The issue in the *Paul* case is not even present in the instant case, however, because there is no markting order for cantaloupes in Arizona.

In rejecting the contention in *Parker v. Brown,* 317 U.S. 341 (1943), that the Agricultural Adjustment Act itself was sufficient to pre-empt the field, this Court stated as follows:

> It is evident, therefore, that the Marketing Act contemplates the existence of state programs at least until such time as the Secretary shall establish a federal marketing program, unless the state program in some way conflicts with the policy of the federal act. The Act contemplates that each sovereign shall operate 'in its own sphere but can exert its authority in conformity rather than in conflict with that of the other.' 317 U.S. at 341.

The Appellee has pointed to no provisions in any federal acts which are inconsistent with Arizona's Fruit and Vegetable Standardization Act, and we know of none.

Without question, the Secretary of Agriculture could, pursuant to the terms of the Agricultural Adjustment Act, promulgate a marketing order or marketing orders which would control the shipment of loose cantaloupes across state lines, thus superseding Arizona law in this regard. The fact of the matter is, however, that the Secretary has not issued such an order. Arizona is, therefore, entitled to enforce its own law through its own enforcement officers.

IV.

Finally, the appellee's brief contains a number of statements which are either misleading or erroneous. While most of these assertions are of tangential relevance at best, correction of some is warranted in order to set the case in proper perspective.

A. If the appellee means to imply that Mr. Pike issued his order as a result of action taken by the Arizona Vegetable Growers Association, the implication is not supported by the record and is flatly false. The record shows that Mr. Pike attended a meeting of the Board of Directors of the Arizona Vegetable Growers Association at which two bills were discussed, one of them involving "the bulk movement out of the state of vegetables and melons." (Appendix, p. 49). The controverted order, however, did not issue following Mr. Pike's attendance at that meeting, but rather following the final defeat of the bill which, in the language of Mr. Gipe, manager of appellee's Arizona operation "would have allowed, with the supervisor of inspection's approval, the transporting of vegetables and melons to any point 25 miles from the state line for packing, shipment and interstate commerce." Gipe deposition 22/6-10. Mr. Pike stated that "when they have tried to get this bill through the Arizona Legislature and the Legislature wouldn't pass it, I could see no other alternative for me only to enforce the law." Pike deposition 56/10-13. Accordingly, he sent the letter to which the appellee objects.

B. The appellee's brief asserts at several points that the appellant, Mr. Pike, stated at his deposition that the state would suffer

no harm if the appellee's cantaloupes were shipped loose into the State of California. Mr. Pike's statement in fact was that "I wouldn't [suffer any detriment] as long as it's under a court order." (Pike Deposition 59/19-20) The total context of the statement reveals clearly that what he meant was that he personally would not suffer any detriment. The immediately preceding question, for example, was "Would you suffer any detriment?" (*Id.* at 59/17-18)

C. The complete failure to enforce, extending over a period of more than fifty years, in *Lassen v. Arizona,* 385 U.S. 458 (1967), was not a failure by the State of Arizona, as contended by the appellee, but rather by the United States Department of Justice, which had no interest in the controversy in that case. Enforcement of the public lands provisions of the Arizona Enabling Act is vested by that Act in the United States Attorney General. *Arizona Enabling Act,* Section 28, Act of June 20, 1910, c. 310, 36 U.S. Stat. 577, 568-579. The appellee's attempted distinction of the case on the basis that the enforcement failure was self-serving is therefore incorrect.

D. The appellee's reference to federal inspection is misleading. There is no marketing order applicable to cantaloupes within the State of Arizona, and the only federal inspection which occurs is for the purpose of grading. Federal inspection for grading purposes occurs only upon request by the shippers and the cost of the inspection is paid by the shipper requesting the inspection. The federal inspectors have no powers to prohibit shipment of produce which does not meet minimum standards. See 7 C.F.R., Part 51.

E. The only cantaloupes whose movement in interstate commerce is prohibited by the Act are those cantaloupes which do not meet the standards prescribed by the Act. This fundamental principle is completely overlooked by the appellee's repeated assertions that the Act interdicts interstate movement. From the propriety of a state's interest in prescribing standards, it neces-

sarily follows that some cantaloupes will not meet those standards, and consequently cannot be shipped. Enforcement would be meaningless if the shipper were vested with the prerogative to decide for himself which produce would be shipped. There is no meaningful difference in this regard between fruit and vegetable standardization inspection and inspection related to such matters as pickle worm prevention or inspections such as were involved in *Sligh v. Kirkwood.* As to all such matters, if the shipper refuses to comply with the State requirements, the State has no alternative except to prohibit shipment of his produce until it has been inspected and a determination made as to which produce complies with the statutory standards, and which does not. Surely the appellee would not contend that it would be entitled to ship its produce in spite of its refusal to submit to a pickle worm inspection. Analytically, the only difference between the two inspections is that one requires additional expenditures by the appellee as a result of appellee's inability to pack except in a packing shed. As developed in our opening brief, additional cost to a profit making corporation is not a sufficient basis to invalidate state legislation on commerce clause grounds.

CONCLUSION

We submit that the legitimacy of Arizona's interest in prescribing standards of quality and pack for produce shipped from this state is beyond question. Even the appellee agrees "that the laws of Arizona in this regard are salutary laws." Reporter's Transcript of Proceedings on Plaintiff's Application for Preliminary Injunction, 30/2-3.

The controlling issue, therefore, is whether this Court will hold that the actual objectives of Arizona's Standardization Law are not the stated objectives, but rather are objectives which will make the act unconstitutional.

This Court has made it very clear in a wealth of decisions, some of which are discussed at pages 34-37 of our opening brief, that "a legislative judgment . . . is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility." *South Carolina v. Barnwell Bros.,* 303 U.S. 177, 191 (1938). Consistent with this principle, improper, invalidating purposes were found in *Johnson v. Haydel,* 278 U.S. 16 (1928) and *Toomer v. Witsell,* 334 U.S. 385 (1948) solely because there was no other possible purpose.

From this Court's decisions in *Sligh v. Kirkwood,* 237 U.S. 52 (1915) and *Pacific States Box & Basket Co. v. White,* 296 U.S. 176 (1935), it follows necessarily that the State of Arizona has pursued a proper objective in enacting its Fruit and Vegetable Standardization Act. Conformity with some of the most important provisions of that Act—among them, the avoidance of deceptive packs, requirements of uniformity of color and varietal characteristics, and the requirement that the State of Arizona be given credit for produce packed under the demanding standards of its Standardization Act by identifying the farm or orchard of origin—can only be enforced by an inspection in the pack. The impact upon the appellee's business, and the impact upon interstate commerce, if any, is "incidental, indirect, and beyond the

purposes of the legislation." *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426 (1936).

It is respectfully submitted that the judgment of the lower court should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1959

No. 201

LOREN J. PEEK, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,

Appellant,

vs.

BRUCE CHURCH, INC., a California corporation,

Appellee.

On Appeal from the United States District Court for the District of Arizona.

SUPPLEMENTAL BRIEF OF APPELLEE

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,
Appellant,

vs.

BRUCE CHURCH, INC.,
a California corporation,
Appellee.

On Appeal from the United States District Court for the District of Arizona

SUPPLEMENTAL BRIEF OF APPELLEE

This Supplemental Brief is filed by Appellee pursuant to Rule 41, Paragraph 5, of the Court's Rules.

Since the filing of Appellee's Brief, there has been received by Appellee the text of a "standardization law"

newly enacted at the last session of the New York Legislature. The law expresses in very clear and explicit terms the constitutional limitations given effect by the three-judge District Court below and which we are asking this Honorable Court to affirm.

In Appellant's enumeration of the standardization laws of "other states", no mention was made of the New York law.

The statute in question is Chapter 595 of the Laws of New York, entitled "An Act to amend the Agriculture and Markets Law, in relation to grade, brand and sale of lettuce", adopted on May 21, 1969. It adds to the Agriculture and Markets Law a new article, Article 13-C. The article authorizes the Commissioner of Agriculture of the State of New York to establish standards for grading and classifying lettuce which is *"packed or repacked within the state"*. It provides in part:

> "§ 160-q. Grades and branding. The commissioner is hereby authorized and empowered, after investigation and public hearing, to fix and promulgate official standards including good delivery standards at retail level for grading and classifying lettuce *packed or repacked within the state,* and to change any of them from time to time. In establishing such standards he shall, among other things, take into account so far as applicable the factors of maturity, condition, solidity, color, size, temperature control and freedom from defects and injury. The official standards so fixed and promulgated shall not be lower in their requirements than the minimum requirements of the official standards for corresponding grades of lettuce as promulgated from time to time

by the secretary of agriculture of the United States, which standards are commonly known as the "United States grades". (Italics ours.)

The statute provides further, in Section 160-t,

"§ 160-t APPLICATION OF ARTICLE

This act shall not apply to the sale of any lettuce which lettuce is ultimately sold outside of the state of New York."

Under the authority conferred upon him by the law, the Commissioner of Agriculture has adopted Rules and Regulations, designated as Part 188 (Lettuce Grades and Definitions of Culls) and Part 189 (Rules and Regulations Relating to Lettuce), which relate, among other matters, to "standard pack" in terms similar to the provisions of the Arizona law.

The principle that state regulation with reference to "pack" and "packing" is to be limited to packing done *in the state* is thus given clear recognition in the law of New York.

The Regulations, Part 188, specify that:

"Packing of product in conformity with the requirements of these standards shall not excuse failure to comply with the provisions of the Food, Drug and Cosmetic Act, other Federal Laws and Regulations, Article 17 of the Agriculture and Markets Law, and Rules promulgated pursuant thereto or with applicable provisions of the laws and regulations of other states."

The full text of the addition to the New York statute, Article 13-C, is set forth in the Supplement hereto.

CONCLUSION

For the reasons set forth in Appellee's Brief and in this Supplemental Brief, it is respectfully submitted that the judgment of the three-judge District Court below should be affirmed.

Dated, Salinas, California,
January 7, 1970.

Respectfully submitted,
JACOB ABRAMSON,
Attorney for Appellee.

EVANS, KITCHEL & JENCKES,
ABRAMSON & CHURCH,
Of Counsel.

(Supplement Follows)

Supplement

LAWS OF NEW YORK—BY AUTHORITY

CHAPTER 595

AN ACT to amend the agriculture and markets law, in relation to grade, brand and sale of lettuce

Became a law May 21, 1969, with the approval of the Governor. Passed by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The agriculture and markets law is hereby amended by adding thereto a new article, to be article thirteen-c, to read as follows:

ARTICLE 13-C
LETTUCE

Section 160-p. Definitions.

Section 160-q. Grades and branding.

Section 160-r. Sale of lettuce.

Section 160-s. Rules and regulations.

Section 160-t. Application of article.

§ 160-p. Definitions. As used in this article:

1. The words "closed package" mean a crate, box, carton or other container, the contents of which cannot be adequately inspected without opening.

2. The word "lettuce" means iceberg type lettuce.

§ 160-q. Grades and branding. The commissioner is hereby authorized and empowered, after investigation and

public hearing, to fix and promulgate official standards including good delivery standards at retail level for grading and classifying lettuce packed or repacked within the state, and to change any of them from time to time. In establishing such standards he shall, among other things, take into account so far as applicable the factors of maturity, condition, solidity, color, size, temperature control and freedom from defects and injury. The official standards so fixed and promulgated shall not be lower in their requirements than the minimum requirements of the official standards for corresponding grades of lettuce as promulgated from time to time by the secretary of agriculture of the United States, which standards are commonly known as the "United States grades".

Each closed package of lettuce, when sold, exposed for sale or transported for sale, shall be plainly and conspicuously branded to show:

1. Grade.
2. Number of heads.
3. That the package was vacuum cooled if such be the fact.
4. Name and address of packer or repacker.

In case the branding upon any closed package of lettuce is changed, the person making the change shall cancel the name and address of the original packer and substitute therefor his own name and address.

§ 160-r. Sale of lettuce. 1. No person shall sell, expose for sale or transport for sale within this state,

regardless of place of origin, lettuce in closed packages which are not branded as required by section 160-q, except that lettuce packaged by a retailer and sold or offered for sale by such retailer, need be branded only as to grade.

2. No person shall sell or expose for sale at retail single unwrapped heads of lettuce except from a bulk display which shall be plainly and conspicuously marked as to grade.

3. No person shall sell, offer for sale, or transport for sale lettuce in open or closed packages, or unwrapped lettuce, if the branding, representation as to grade, or any statement, design or device appearing on the label, package or bulk display shall be false or misleading in any particular.

4. When lettuce in closed packages is delivered to a common carrier for shipment, such delivery shall be presumptive evidence that the lettuce is intended for sale.

5. No lettuce shall be sold in cardboard containers unless it is vacuum cooled.

§ 160-s. Rules and regulations. The commissioner is hereby authorized, after public hearing, to adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of this article as he may deem necessary.

§ 160-t. Application of article. This act shall not apply to the sale of any lettuce which lettuce is ultimately sold outside of the state of New York.

§ 2. This act shall take effect immediately.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 301.—October Term, 1969

Loren J. Pike, etc., Appellant,
v.
Bruce Church, Inc.

On Appeal From the United States District Court for the District of Arizona.

[March 2, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

The appellee is a company engaged in extensive commercial farming operations in Arizona and California. The appellant is the official charged with enforcing the Arizona Fruit and Vegetable Standardization Act.[1] A provision of the Act requires that, with certain exceptions, all cantaloupes grown in Arizona and offered for sale must "be packed in regular compact arrangement in closed standard containers approved by the supervisor . . . ."[2] Invoking his authority under that provision, the appellant issued an order prohibiting the appellee company from transporting uncrated cantaloupes from its Parker, Arizona, ranch to nearby Blythe, California, for packing and processing. The company then brought this action in a federal court to enjoin the order as unconstitutional. A three-judge court was convened. 28 U. S. C. §§ 2281, 2284. After first granting temporary relief, the court issued a permanent injunction upon the ground that the challenged order constituted an unlawful burden upon interstate commerce. This appeal followed. 28 U. S. C. § 1253. 396 U. S. 812 .

[1] Ariz. Rev. Stat., Tit. 3, Ch. 3, Art. 4.

[2] Ariz. Rev. Stat. § 3-503 C.

The facts are not in dispute, having been stipulated by the parties. The appellee company has for many years been engaged in the business of growing, harvesting, processing, and packing fruits and vegetables at numerous locations in Arizona and California for interstate shipment to markets throughout the Nation. One of the company's newest operations is at Parker, Arizona, where, pursuant to a 1964 lease with the Secretary of the Interior, the Colorado River Indian Agency, and the Colorado River Indian Tribes, it undertook to develop approximately 6,400 acres of uncultivated, arid land for agricultural use. The company has spent more than $3,000,000 in clearing, leveling, irrigating, and otherwise developing this land. The company began growing cantaloupes on part of the land in 1966, and has harvested a large cantaloupe crop there in each subsequent year. The cantaloupes are considered to be of higher quality than those grown in other areas of the State. Because they are highly perishable, cantaloupes must upon maturity be immediately harvested, processed, packed, and shipped in order to prevent spoilage. The processing and packing operations can be performed only in packing sheds. Because the company had no such facilities at Parker, it transported its 1966 Parker cantaloupe harvest in bulk loads to Blythe, California, 31 miles away, where it operated centralized and efficient packing shed facilities. There the melons were sorted, inspected, packed, and shipped. In 1967 the company again sent its Parker cantaloupe crop to Blythe for sorting, packing, and shipping. In 1968, however, the appellant entered the order here in issue, prohibiting the company from shipping its cantaloupes out of the State unless they were packed in containers in a manner and of a kind approved by the appellant. Because cantaloupes of the quantity involved can be so packed only in packing sheds, and because no such facilities were

available to the company at Parker or anywhere else nearby in Arizona, the company faced imminent loss of its anticipated 1968 cantaloupe crop in the gross amount of $700,000. It was to prevent this unrecoverable loss that the District Court granted preliminary relief.[3]

After discovery proceedings, an agreed statement of facts was filed with the court. It contained a stipulation that the practical effect of the appellant's order would be to compel the company to build packing facilities in or near Parker, Arizona, that would take many months to construct and would cost approximately $200,000. After briefing and argument, the court issued a permanent injunction, finding that "the order complained of constitutes an unlawful burden upon interstate commerce."[4]

The appellant's threshold contention here is that even though the challenged order expressly forbids the interstate bulk shipment of the company's cantaloupes, it imposes no burden upon interstate commerce. If the Arizona Act is complied with, he argues, all that will be regulated will be the intrastate packing of goods destined for interstate commerce. Articles being made ready for interstate movement are not necessarily yet in interstate commerce, which, he says, begins only when the articles are delivered to the interstate shipper. In making this argument, the appellant relies on this Court's decisions in *Federal Compress Co.* v. *McLean*, 291 U. S. 17, and *Chassaniol* v. *City of Greenwood*, 291 U. S. 584.

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[3] In view of the emergency situation presented, and the fact that only a narrow and specific application of the Act was challenged as unconstitutional, the court was fully justified in not abstaining from the exercise of its jurisdiction pending litigation in the state courts. Compare *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 329 with *Reetz* v. *Bozanich*, — U. S. —.

[4] The opinion of the District Court is unreported.

Both of those cases involved taxes imposed by Mississippi on a cotton warehouse and compress business located within that State. The taxes were nondiscriminatory and were levied both on the warehoused cotton itself and on certain processes necessary to ready it for subsequent resale. The taxes were challenged as unlawful burdens on interstate commerce, since most of the taxed cotton was ultimately to be shipped to out-of-state buyers. The Court upheld the constitutionality of the Mississippi taxes. It is not entirely clear from the Court's opinions whether their rationale was that the taxes were imposed before interstate commerce had begun, or that the burden upon commerce was at the most indirect and remote.

But in any event, the decisions do not support the argument that the order in the present case does not affect interstate commerce. In the first place, those cases involved cotton that had come to rest in Mississippi, and "before shipping orders [were] given, it [had] no ascertainable destination without the State." 291 U. S., at 21. Here, by contrast, the perishable cantaloupes were destined to be shipped to an ascertainable location in California immediately upon harvest. Even more to the point, the taxes in *Federal Compress* and *Chassaniol* were imposed on goods and operations within the State, whereas the application of the statute at issue here would require that an operation now carried on outside the State must be performed instead within the State so that it can be regulated there. If the appellant's theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge. Yet such statutes have been consistently invalidated by this Court under the Commerce Clause. *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1; *Johnson, Jr.* v. *Haydel*, 278

U. S. 16; *Toomer* v. *Witsell*, 334 U. S. 385. See also, *Lemke* v. *Farmer's Grain Co.*, 258 U. S. 50; *Shafer* v. *Farmer's Grain Co.*, 268 U. S. Thus it is clear that the appellant's order does affect and burden interstate commerce, and the question then becomes whether it does so unconstitutionally.

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens. See, *e. g.*, *Shafer* v. *Farmer's Grain Co.*, *supra*.

At the core of the Arizona Fruit and Vegetable Standardization Act are the requirements that fruits and vegetables shipped from Arizona meet certain standards of wholesomeness and quality, and that they be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not "materially misrepresent" the quality of the lot as a whole.[5] The impetus for the Act was the fear that some growers were shipping inferior or deceptively packaged produce,

[5] Ariz. Rev. Stat. §§ 3–481 (7) and (8).

with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced. It was to prevent this that the Act was passed in 1929. The State has stipulated that its primary purpose is to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging.

We are not, then, dealing here with "State legislation in the field of safety where the propriety of local regulation has long been recognized," [6] nor with an act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State. These are surely legitimate state interests. *Sligh* v. *Kirkwood,* 237 U. S. 52, 61. We have upheld a State's power to require that produce packaged in the State be packaged in a particular kind of receptacle, *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176. And we have recognized the legitimate interest of a State in maximizing the financial return to an industry within it. *Parker* v. *Brown,* 317 U. S. 341. Therefore, as applied to Arizona growers who package their produce in Arizona, we may assume the constitutional validity of the Act. We may further assume that Arizona has full constitutional power to forbid the misleading use of its name on produce that was grown or packed elsewhere. And, to the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce "is not the legitimate subject of trade or commerce, nor within the protection of the Commerce Clause of the Constitution." *Sligh* v. *Kirkwood, supra; Baldwin* v. *Seelig,* 294 U. S. 511.

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[6] *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 796 (DOUGLAS, J., dissenting).

But application of the Act through the appellant's order to the appellee company has a far different impact, and quite a different purpose. The cantaloupes grown by the company at Parker are of exceptionally high quality. The company does not pack them in Arizona and cannot do so without making a capital expenditure of approximately $200,000. It transports them in bulk to nearby Blythe, California, where they are sorted, inspected, packed, and shipped in containers that do not identify them as Arizona cantaloupes, but bear the name of their California packer.[7] The appellant's order would forbid the company to pack its cantaloupes outside Arizona, not for the purpose of keeping the reputation of its growers unsullied, but to enhance their reputation through the reflected goodwill of the company's superior produce. The appellant, in other words, is not complaining because the company is putting the good name of Arizona on an inferior or deceptively packaged product, but because it is not putting that name on a product that is superior and well packaged. As the appellant's brief puts the matter, "It is within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality Parker fruit was grown in Arizona."[8]

Although it is not easy to see quite why the other growers of Arizona are entitled to benefit at the company's expense from the fact that it produces superior crops, we may assume that the asserted state interest is a legitimate one. But the State's tenuous interest in

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[7] California Agricultural Code § 45691. The California Fruit, Nut and Vegetable Standardization Act, California Agricultural Code, Division 17, is virtually identical to the Arizona Act. Each statute has the same primary purpose of preventing deceptive packs, and it is stipulated that the standard containers required for cantaloupes in the two States are exactly the same.

[8] Appellant's Brief, p. 43.

having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State which could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal. *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1; *Johnson, Jr.* v. *Haydel*, 278 U. S. 16; *Toomer* v. *Witsell*, 334 U. S. 385.

The appellant argues that the above cases are different because they involved statutes whose express or concealed purpose was to preserve or secure employment for the home State, while here the statute is a regulatory one and there is no hint of such a purpose. But in *Toomer* v. *Witsell, supra*, the Court indicated that such a burden upon interstate commerce is unconstitutional even in the absence of such a purpose. In *Toomer* the Court held invalid a South Carolina statute requiring that owners of shrimp boats licensed by the State to fish in the maritime belt off South Carolina must unload and pack their catch in that State before "shipping or transporting it to another state." What we said there applies to this case as well:

> "There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration, and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in

South Carolina even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry." 334 U. S., at 403–404.[9]

While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

The judgment is affirmed.

[9] Because of the State's recognized common law property interest in its fish and wild game, *Toomer* presented an especially strong case for state control.